No. 82-69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

May a non-employer claim the labor exemption from the antitrust laws to protect its agreement with a union and a contractor where that agreement was reached outside of the collective bargaining process and established an escrow fund to provide artificially high wage payments to union members employed by the contractor and it is asserted that the agreement was entered into with the intent to drive the contractor's competitors out of business by imposing those artificially high wages on them and to destroy the ability of the associations representing the competitors to engage in effective collective bargaining?

Must a complaint, to state a cause of action under the antitrust laws, allege that the union and each of its non-labor co-conspirators shared the same anticompetitive purpose and derived a benefit from the restraint alleged?

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[1] List of Parties—The caption of the case in this Court contains all the parties to the proceeding in the court whose judgment is sought to be reviewed. None of the Petitioners have any parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
1. Jurisdiction in the Court of First Instance	3
2. The Facts	3
3. The Decision of the District Court	5
4. The Decision of the Court of Appeals	5
REASONS FOR GRANTING THE WRIT	6
The Decision of the Court Below Conflicts With This Court's Decisions and the Decisions of Other Courts of Appeals and Presents Questions of Substantial and Recurring Importance Regarding the Relationship Between the Labor and Antitrust Laws and Therefore Is Appropriate for Decision by This Court	6
1. The Decision Below Conflicts with Decisions of This Court and Numerous Courts of Appeals and Impermissibly Expands the Scope of the Labor Exemptions	7
2. The Decision Below Improperly Required Plaintiffs to Allege that Each Party to an Agreement Having Anticompetitive Effects Shared the Same Anticompetitive Purpose and Directly Benefited Thereby	11
CONCLUSION	13
Appendix A	1a
Appendix B	26a
Appendix C	33a
Appendix D	50a
Appendix E	52a
Appendix F	54a

TABLE OF AUTHORITIES

PAGE

Cases

Allen Bradley Co. v. *Local 3, IBEW*, 325 U. S. 797, *reh. denied*, 326 U. S. 803 (1945) 8

Altemose Construction Co. v. *Atlantic, Cape May, etc.*, 493 F. Supp. 1181 (D. N. J. 1980) 8

California State Council of Carpenters v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, ____ U. S. ____, 102 S. Ct. 998 (1982) 8

Connell Construction Co. v. *Plumbers and Steamfitters Local 100*, 421 U. S. 616 (1975), *reh. denied*, 423 U. S. 884 (1975) 7, 8, 9

Donald Schriver v. *NLRB*, 635 F. 2d 859 (D. C. Cir. 1980), *cert. denied*, 451 U. S. 976 (1981) 9

Larry K. Muko, Inc. v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978) ... 8

Mackey v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977) 8

Pacific Northwest Chapter of the Associated General Contractors, Inc. v. *NLRB*, 654 F. 2d 1301 (9th Cir. 1981), *aff'd in part and vacated in part*, ____ U. S. ____, 110 LRRM 2377 (1982) 10

Snyder Company v. *ASC*, 677 F. 2d 1111 (6th Cir. 1982) 7, 12

UMW v. *Pennington*, 381 U. S. 657 (1965) 6, 11, 12

Woelke & Romero Framing v. *NLRB*, ____ U. S. ____, 110 LRRM 2377 (1982) 9

Statutes

National Labor Relations Act, 29 U. S. C. § 151 *et seq.* 7, 8, 12

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MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, appears in the Appendix hereto (Appendix A, *infra,* pp. 1a-25a). The Memorandum

Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported and appears in the Appendix hereto (Appendix B, *infra*, pp. 26a-32a).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 13, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U. S. C., § 1 *et seq.*), and the Clayton Act (15 U. S. C. § 12 *et seq.*), are set forth in Appendix F, *infra*, p. 54a.

STATEMENT OF THE CASE

1.

Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26.

2.

The Facts

The Petitioners are three associations (the "Associations"), which are engaged in the business of representing contractors in collective bargaining negotiations, and two contractors (the "Contractors"), which are members of the Associations (App. C, pp. 34a-36a). The Respondents are Will County Carpenters District Council and its international union (the "Union(s)"), Commonwealth Edison Company ("Commonwealth") and Gust K. Newberg Construction Co. ("Newberg") (App. C, p. 36a). The Unions are labor organizations engaged in the representation of carpenters (App. C, p. 36a). Commonwealth, a public utility, was building two large electrical generating facilities in Will County, Illinois and had contracted with Newberg for the performance of construction services at those sites (the "Commonwealth Projects") (App. C, p. 40a). This case stems from a labor dispute in Will County in 1979.

The Associations represented the Contractors and most other commercial and residential construction contractors in Will County and historically had negotiated collective bargaining agreements with the Union, which agreements have been adopted by other contractors in Will County, including Newberg (App. C, pp. 38a-39a). In 1979, however, the Associations and the Union could not agree on contract terms prior to the expiration of the existing collective bargaining

agreement (App. C, p. 39a). Shortly after the existing agreement expired, the Union directed its members to engage in selective picketing and strikes against certain contractor members of the Associations. To counteract the Union's whipsaw strategy, the Associations directed their members to engage in a defensive lockout of the Union (App. C, p. 39a). The Commonwealth Projects were also subject to the strike and lockout because Newberg, although not a member of the Associations, employed Union carpenters (App. C, p. 40a).

To induce the Union and Newberg to return to work on the Commonwealth Projects, Commonwealth instigated and negotiated an agreement (the "Escrow Agreement") with the Union and Newberg separate and apart from the then ongoing collective bargaining negotiations between the Associations and the Union (App. C, p. 41a). Pursuant to the Escrow Agreement, Newberg agreed to pay $2.25 per hour into escrow for each hour worked for it by Union carpenters during the strike (App. C, p. 42a). Commonwealth agreed to subsidize Newberg's payments (App. C, p. 42a). The Union agreed that Will County carpenters would return to work on the Commonwealth Projects despite the absence of a collective bargaining agreement (App. C, p. 43a). The Union continued to strike all contractors who refused to participate in the Escrow Agreement.

Approximately twenty-five percent of all Will County Union carpenters were employed by Newberg on the Commonwealth Projects (App. C, p. 43a). The Respondents knew and intended that the Escrow Agreement, by returning to work twenty-five percent of the Union carpenters at the artificially inflated wage level subsidized by Commonwealth, would establish, as a practical matter, a minimum level of wage increase which prevented any possibility of a lower settlement being reached in the then ongoing collective bargaining negotiations between the Union and the Associations. The President of the international union admitted "that the [E]scrow [A]greement

had tied our hands" with respect to the negotiations (App. D, p. 51a). Approximately four weeks after the Escrow Agreement was made, the Associations were forced to capitulate to the Union's demands for the "excessive and unrealistic" wage increases (App. E, p. 52a) agreed to by Respondents in the Escrow Agreement (App. C, p. 43a).

As a direct and intended consequence of the artificially high wages imposed by the Escrow Agreement, the Contractors were injured in their ability to compete in the construction market, while Newberg was insulated from the anticompetitive effects of the Escrow Agreement by Commonwealth's subsidies (App. C, p. 44a). Further, the Escrow Agreement emasculated the collective bargaining process in Will County and thereby directly injured the abilities of the Associations to engage in their respective businesses (App. C, p. 44a).

3.

The Decision of the District Court

The District Court dismissed Petitioners' Complaint on the grounds that it failed to state a cause of action, characterizing the Complaint to "allege only a direct restraint on the labor market" (App. B, p. 30a). The District Court's conclusion was premised on the fact that the alleged conspiracy was effectuated primarily through a wage agreement and that Commonwealth and Newberg allegedly derived no direct competitive benefit from the restraint. The District Court did not analyze the case in terms of the statutory and non-statutory labor exemptions from the antitrust laws.

4.

The Decision of the Court of Appeals

The Court of Appeals affirmed the District Court's decision holding that "[b]oth the statutory and non-statutory labor exemptions served to immunize [Respondents'] activities from

antitrust liability" (App. A, pp. 24a-25a). The Court of Appeals reasoned that the statutory exemption applies to collective bargaining agreements. Although the Court of Appeals recognized that the Escrow Agreement "was not, strictly speaking, a collective bargaining agreement" (App. A, p. 11a, n. 14), it considered the Escrow Agreement to be "similar to a traditional collective bargaining agreement" (App. A, p. 11a, n. 14). The Court of Appeals failed to consider how Commonwealth's participation in the Escrow Agreement affected the applicability of the labor exemption. Ruling that Petitioners' allegations rested solely upon the existence of a "collective bargaining agreement" concerning a mandatory subject of bargaining, namely wages, the Court of Appeals held that "the statutory labor antitrust exemption applies" (App. A, pp. 12a, n. 15, 14a). The Court of Appeals further stated that the Petitioners had not established a claim under a *Pennington* mode of analysis, having failed to allege that Newberg and Commonwealth "would *directly* benefit from the restraint" (App. A, p. 15a) or that the Respondents shared "a *concerted anti-competitive purpose*" (App. A, p. 16a (original emphasis)). Finally, the Court of Appeals held that the non-statutory exemption applied because "[t]he complaint alleges no more than an agreement to restrain the labor market" (App. A, p. 24a).

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Conflicts With This Court's Decisions and the Decisions of Other Courts of Appeals and Presents Questions of Substantial and Recurring Importance Regarding the Relationship Between the Labor and Antitrust Laws and Therefore Is Appropriate for Decision by This Court

The decision below seriously disrupts the careful balance established by this Court between the inherently conflicting

objectives of the antitrust and labor laws. The decision below also serves to undermine the long-standing congressional policy favoring the resolution of labor-management disputes through *bona fide* collective bargaining as set forth in the National Labor Relations Act, 29 U. S. C. 151 *et seq.* ("NLRA").

1.

The Decision Below Conflicts with Decisions of This Court and Numerous Courts of Appeals and Impermissibly Expands the Scope of the Labor Exemptions

Contrary to the decision of the court below, the Escrow Agreement is not exempt from the antitrust laws by virtue of either the statutory or non-statutory labor exemptions. The statutory exemption applies only to unilateral union activity and can only be asserted by unions. As the court in *Snyder Company* v. *ASC*, 677 F. 2d 1111, 1118, n. 10 (6th Cir. 1982), stated:

> "Th[e] [statutory] exemption can only be asserted by a labor organization itself and will be lost if the union combines or conspires with a non-union group to restrain trade. See, e.g., Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797 (1945) .... Because defendants in the present case are not labor organizations, they could not assert the statutory exemption." [Other citations omitted.]

Since Commonwealth and Newberg, both of which are non-labor entities, were parties to the Escrow Agreement, the statutory exemption is inapplicable. By ruling that the statutory labor exemption applies to a combination of labor and non-labor entities, the decision of the court below conflicts with the uniform rulings of this Court and every other court that has interpreted the scope of the statutory labor exemption. *See, Connell Construction Co.* v. *Plumbers and Steamfitters Local*

100, 421 U. S. 616, *reh. denied*, 423 U. S. 884 (1975); *see also, e.g., California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, ____ U. S. ____, 102 S. Ct. 998 (1982); *Mackey* v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977).

The non-statutory exemption was created by the courts to exempt *bona fide* collective bargaining agreements between unions and employers, the anticompetitive effects of which are consistent with national labor policy. Such agreements are exempt "as a proper accommodation between congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets. . ." *Connell, supra* at 622. Employers as well as labor organizations may invoke the non-statutory exemption but only with respect to *bona fide* collective bargaining agreements negotiated in good faith in accordance with the NLRA. *See, Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797, *reh. denied*, 326 U. S. 803 (1945); *Larry K. Muko, Inc.* v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978); *Altemose Construction Co.* v. *Atlantic, Cape May, etc.*, 493 F. Supp. 1181 (D. N. J. 1980).

However, Commonwealth, which negotiated the terms of the Escrow Agreement, employed no carpenters and was thus an utter stranger to the collective bargaining relationship between union and employer. Therefore, the Escrow Agreement was not and could not be a *bona fide* collective bargaining agreement. The court below itself recognized that the Escrow Agreement "was not, strictly speaking, a collective bargaining agreement" (App. A, p. 11a, n. 14). Nor did any of the Respondents view the Escrow Agreement as a legitimate collective bargaining agreement between union and employer. Rather, the Union conceded that "both Newberg and Edison were valuable pawns" with whom it could conspire to impose the

terms of the Escrow Agreement on all Will County carpenters.[2] Furthermore, the Respondents agreed that if they were unsuccessful in imposing the terms of the Escrow Agreement, they would be bound by the terms of the collective bargaining agreements ultimately negotiated between the Union and the Associations (App. A, p. 3a, n. 2).

Connell and cases decided subsequent to it make clear that the existence of a collective bargaining relationship is a condition precedent of the availability of the non-statutory labor exemption. The court below totally ignored this crucial requirement. In *Woelke & Romero Framing* v. *NLRB*, ____ U. S. ____, 110 LRRM 2377 (1982), this Court ruled that a restrictive subcontracting agreement between a union and an employer in the construction industry was lawful because it was negotiated in the context of a collective bargaining relationship. *See also, Donald Schriver* v. *NLRB*, 635 F. 2d 859 (D.C. Cir. 1980), *cert. denied*, 451 U. S. 976 (1981). In *Connell* a similar restrictive agreement having the same effect on competition was found to be outside the ambit of the labor exemption precisely because it was *not* the product of collective bargaining. Commonwealth, like Connell, employed no members of the conspiring union and thus could not have a legitimate collective bargaining relationship which could have immunized the anticompetitive effects of the Escrow Agreement.

The non-statutory labor exemption from the antitrust laws is predicated upon the assumption that management and labor will wield their economic power solely within the confines of the collective bargaining process. In *Connell*, this Court found the anticompetitive agreement between the union and Connell

[2] On p. 11 of its brief filed with the Seventh Circuit Court of Appeals, Will County Carpenters District Council argued: "Each side [*i.e.*, the Union and the Associations] wanted merely the best deal possible and both Newberg and Edison were valuable pawns directly interested in the dispute."

unlawful because it permitted the union to exert unlimited "top-down" organizational pressure through Connell outside of a collective bargaining relationship. *See also, Pacific Northwest Chapter of the Associated General Contractors, Inc.* v. *NLRB*, 659 F.2d 1301 (9th Cir. 1981), *aff'd in part and vacated in part*, ____ U.S. ____, 110 LRRM 2377 (1982). Commonwealth's agreement to make available its prodigious economic resources to subsidize Respondents' combination devastated the Associations' ability to engage in effective collective bargaining because the Associations could not exert any countervailing economic pressure upon Commonwealth since it was outside of the collective bargaining relationship between the Union and the Associations. Commonwealth's instigation and funding of the Escrow Agreement radically altered in favor of the Union the normal balance of power which governs the collective bargaining process and effectively precluded the Associations from negotiating terms different from those contained in the Escrow Agreement. Thus, the level of carpentry wages was not established through the "give and take" of collective bargaining where the respective economic strengths of union and employer determine the outcome. Rather, the wage level was established and imposed upon all Will County contractors pursuant to the Respondents' conspiracy. It would be an anomaly to permit Commonwealth to invoke an exemption based upon the national policy of favoring collective bargaining to shield conduct that was intended and, in fact, did frustrate that process.

To preserve the stability and integrity of the collective bargaining process, this Court should reaffirm that the statutory labor exemption applies only to labor organizations engaged in unilateral activity and that the non-statutory exemption applies only to *bona fide* collective bargaining agreements between employers and labor organizations, the anticompetitive effects of which are consistent with national labor policy.

2.

The Decision Below Improperly Required Plaintiffs to Allege that Each Party to an Agreement Having Anticompetitive Effects Shared the Same Anticompetitive Purpose and Directly Benefited Thereby

The decision below requires a plaintiff in a labor-antitrust case to plead that each conspirator shared a predatory intent to injure competition so that each of the non-labor conspirators directly benefited thereby. The decision misinterprets *UMW* v. *Pennington*, 381 U. S. 657 (1965), and immunizes from the antitrust laws conduct which is clearly anticompetitive and inconsistent with national labor policy.

A review of *Pennington* clearly demonstrates the unlawful character of the Escrow Agreement because the intended and actual effects of the Escrow Agreement preclude reliance upon the labor exemption even if the Escrow Agreement had been made in the collective bargaining context. In *Pennington*, the Court found forfeiture of the labor exemption where the union and certain large mine operators conspired to impose a high wage scale on small operators with the intent to drive them out of business. The Court pointed out that combinations between employers and unions have been found unlawful "without regard to whether they found expression in a collective bargaining agreement . . . and even though the mechanism for effectuating the purpose of the combination was an agreement on wages." *Id.* at 662-63 (Citations omitted). In *Pennington*, the union's purpose in entering the unlawful wage agreement was not to injure small operators or otherwise restrain trade, but to increase the wages paid to its members. Thus, the union's goal was lawful, but the means it chose, a conspiracy with non-labor entities to favor certain operators over others, violated the antitrust laws.

The instant case presents a more complex factual situation than *Pennington* because of the involvement of

Commonwealth, a non-labor, non-employer entity. Respondents conspired by means of the Escrow Agreement to establish, and impose upon contractors in Will County, a ruinously high level of construction costs, with the intent to favor Newberg and injure the contractors in their respective abilities to compete in the construction industry and to destroy the abilities of the Associations to engage in effective collective bargaining. Commonwealth agreed to subsidize the scheme with the knowledge, shared by all the Respondents, that the Escrow Agreement would cause some of Newberg's competitors to be driven out of business (App. E, p. 53a).[3] Unlike Newberg, Commonwealth did not derive a competitive benefit from the restraint. As a public utility monopoly, Commonwealth by definition has no competitors. However, it cannot seriously be contended that Commonwealth's participation immunizes an agreement which otherwise would be unlawful. Respondents' conduct is clearly anticompetitive and is exactly the type of conduct found subject to antitrust scrutiny in *Pennington* and cases decided subsequent to it. Therefore, to impose antitrust liability on Respondents would further both the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets.

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[3] In *Snyder Company* v. *ASC*, 677 F. 2d 1111 (6th Cir. 1982), the court held that where a union and employer conspire to impose a wage scale on non-signatory employers "with conscious knowledge or intent that it would be used to drive competitors out of business . . . then a violation of the antitrust laws has occurred." *Id.* at 1119, quoting *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F. 2d 767, 782 (6th Cir. 1970), *cert. denied*, 402 U. S. 983 (1971).

CONCLUSION

The practical effect of the decision below is to permit non-labor, non-employer entities, such as Commonwealth, which have merely a financial interest in the resolution of a labor dispute to intervene in that dispute to protect their interests at the expense of the collective bargaining process. Thus, the decision allows a purchaser of construction services who believes that the short-term costs of a work stoppage exceed the price then being demanded by a striking union in its negotiations with the actual employers of the union's members to circumvent the collective bargaining process by negotiating directly with the union and favored employers to subsidize a wage agreement which will end the work stoppage and permit the union and favored employers to impose those wages upon the disfavored employers with the intent and effect of driving some of them out of business and to destroy the ability of the associations representing those disfavored employers from engaging in effective collective bargaining.[4] The unprecedented intrusion by Commonwealth, a non-labor, non-employer entity, into an existing collective bargaining relationship is totally inconsistent with the concept of arms-length, good faith bargaining between the Associations and Union and is antithetical to the national policy of encouraging collective bargaining, which policy has served as the basis for the judicially created non-statutory labor exemption from the antitrust laws. Since neither the statutory nor the non-statutory labor exemption is applicable to this kind of combination between labor and non-labor entities, Respondents' conduct is properly subject to antitrust scrutiny.

[4] The issues presented by this petition are of recurring importance because of the tendancy for any developer of a large project, such as a power plant, airport, major office building, etc., faced with a work stoppage, to contemplate protecting its short term financial interests by subverting the collective bargaining process in a manner similar to that employed by Commonwealth.

Petitioners submit that the issues raised by this petition are of signal importance and warrant resolution by this Court. The decision below impermissibly broadens the scope and availability of the labor exemptions while unduly narrowing the circumstances under which a plaintiff may assert a cause of action against a combination of labor and non-labor entities under the antitrust laws, all of which is clearly contrary to the decisions of this Court and numerous Courts of Appeals.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1442

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1832—Frank J. McGarr, *Judge.*

ARGUED OCTOBER 2, 1981—DECIDED APRIL 13, 1982

Before SPRECHER and WOOD, *Circuit Judges,* and BROWN, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This case concerns the scope of the labor exemptions to the federal antitrust laws. Here, contractors and their trade associations claimed that an alleged agreement between a union, a contractor, and a public utility violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Because we find that the acts alleged fall within both the "statutory" and "nonstatutory" labor exemptions we affirm the district court's dismissal of the complaint.

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

I

The plaintiffs are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The defendants are the Will County Carpenters District Council ("the union"), its international, Commonwealth Edison ("Edison"), and the Gust K. Newberg Construction Company ("Newberg"). The action stems from a labor dispute in Will County during the summer of 1979.

The Trade Associations represented most construction contractors in Will County and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facility in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement with the union whereby Edison would "pressure" Newberg, as well as its other contractors, into paying into an escrow account $2.25 per employee for each hour worked during the strike.[1] The contractors were to pay this money into

[1] Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement.

the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations.

The plaintiffs' Section 1 claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which

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[2] The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor.

[3] One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

interfered with the "rights" of the Trade Associations to engage in collective bargaining.

Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted.[4] The plaintiffs challenge this ruling on appeal.

II

In reviewing the dismissal of a complaint, "the well-pleaded factual allegations of the complaint are taken as true." *Ashbrook v. Hoffman*, 617 F.2d 474, 475 (7th Cir. 1980). *Accord, Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A dismissal will be upheld only "if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Ashbrook v. Hoffman*, 617 F.2d 474, 475 (7th Cir. 1980). The court, however, "is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 432 (7th Cir. 1978) (citations omitted). Furthermore, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981). *Accord, Hiland Dairy, Inc. v. Kroger Co.*,

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[4] The court's opinion did not explain its dismissal of the state claims. However, as the defendants demonstrated in their briefs to the district court, dismissal of the state claims for lack of pendent jurisdiction was appropriate once the Sherman Act claim was dismissed. *UMW v. Gibbs*, 383 U.S. 715, 726 (1966). The plaintiffs do not challenge this aspect of the decision on appeal.

402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) ("In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."). An examination of the plaintiffs' complaint in light of these standards demonstrates that the district court properly dismissed the complaint.[5]

We begin with an examination of the history of the labor exemptions. Because this history has been told in detail elsewhere,[6] our sketch can be brief. Following passage of the Sherman Act in 1890, the courts found labor to be a commodity or article of commerce under the Sherman Act, and applied the Act to invalidate the collective bargaining agreements achieved by labor unions. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1908); *United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 (C.C.E.D.La.), *aff'd*, 57 Fed. 85 (5th Cir. 1893). In response, Congress sought to specifically exempt labor union activity by enacting sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17 and 29 U.S.C. § 52. Passage of the Clayton Act, however, failed to achieve this end, for the courts continued to apply the Sherman Act to union activities. *See, e.g., Bedford Cut Stone Co. v.*

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[5] We recognize that the Supreme Court in *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but we do not read *Poller* to require that we ignore Rule 12(b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. "[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980). *Accord, Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

[6] *See, e.g.*, Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 662-66 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-38 (1963); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

Journeymen Stone Cutters' Association, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Alco Zander Co. v. Amalgamated Clothing Workers*, 35 F.2d 203 (E.D. Pa. 1929). Congress, therefore, enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, which sought to exempt labor activities from the application of various statutes. *See United States v. Hutcheson*, 312 U.S. 219, 235-36 (1941). The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity.

In cases decided since the enactment of the Norris-LaGuardia Act, courts have defined the parameters of the labor antitrust exemption. As noted by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975), this has resulted in two distinct exemptions to the antitrust laws—a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* at 622.[7] We turn, therefore, to an examination of each of these exemptions to demonstrate that either one provided a sufficient basis for the district court's dismissal of the plaintiffs' complaint.[8]

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[7] Although the statutory and nonstatutory exemptions thus appear to be based on separate and distinct statutes, "[a]ll the major cases involving labor's antitrust exemption have purported to accommodate the Clayton, Norris-LaGuardia, Wagner, and Sherman Acts.'" *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 423 n.14 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980) (quoting *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 236 n.13 (1975)).

[8] The district court did not analyze the case in terms of statutory and nonstatutory exemptions. However, "[i]t is well settled that on appeal a litigant is entitled to rely on any ground for affirmance, whether or not passed upon by the trial court." *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

A

The statutory labor exemption stems from the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act. 29 U.S.C. §§ 104, 105, and 113. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975). Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment," and states that these acts cannot be "held to be violations of any law of the United States." 29 U.S.C. § 52.

The Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy.[9] The

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[9] A labor dispute is defined by the Act as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

right to bargain collectively is specifically protected.[10] Although the Act does not by its terms provide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates v. Actors' Equity Association*, 451 U.S. 704, 714 (1981). *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723 (1977).

The statutory exemption was first interpreted by the Supreme Court in *United States v. Hutcheson*, 312 U.S. 219 (1941).[11] There, the Court rejected the claim that a union had violated the Sherman Act by, *inter alia*, inducing other unions to cease working for the employer with which the defendant union had a labor dispute. The Court found that Congress' intent in enacting the Norris-LaGuardia Act was to preclude not only injunctions against specified union activities in labor disputes, but Sherman Act liability for those activities as well. *Id.*

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[10] 29 U.S.C. § 102 provides:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .

[11] Although the Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), examined the Clayton and Norris-LaGuardia Act provisions, the Court's decision in that case appears to have rested upon a determination that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption.

at 234-35. The Court enunciated a broad scope for the labor antitrust exemption:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted).

In *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), the Court applied its *Hutcheson* formulation to find that the statutory exemption had been forfeited because the union defendant had conspired with employers to restrain trade. *Id.* at 809. In *Allen Bradley*, the plaintiffs were manufacturers of electrical equipment, manufacturing outside of New York City. The defendant was the local union representing electrical workers in New York City. The plaintiffs challenged an industry-wide agreement negotiated by the union which provided that contractors would purchase equipment only from New York City electrical manufacturers, and the manufacturers would only sell to contractors employing union members. Although the union was acting in its own self-interest, there was substantial evidence that it had conspired with non-labor entities. The Court noted that this evidence extended beyond the collective bargaining agreement which, "standing alone, would not have violated the Sherman Act." *Id.*[12] The Court, therefore, found that the union had forfeited its statutory exemption.

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[12] The Supreme Court made it clear in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 296 (1959), that *Allen Bradley* was intended to set only "outside limits" on the normal rule that agreements reached concerning subjects of mandatory bargaining cannot lead to liability for violation of laws. The Court noted that such an approach was necessary to further the congressional policy "as expressed in the Wagner and Taft-Hartley Acts" of the "promotion of collective bargaining." *Id.* at 295.

As *Hutcheson* and *Allen Bradley* demonstrate, the central questions to be asked in determining whether the plaintiffs' complaint in this case alleged conduct not covered by the statutory labor exemption are whether the union acted in its own self-interest and whether a conspiracy between the union and a non-labor entity was properly pleaded. The plaintiffs concede that the agreement they allege between the district union and Newberg was in the union's self-interest. They claim that the agreement served to achieve an "artificially high wage increase," certainly a result that is in the union's interest. Thus, if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*. We find that the plaintiffs failed to properly plead such a conspiracy. While the plaintiffs' complaint uses the word "conspiracy" repeatedly, it cannot fairly be read to remove the alleged conduct from the reach of the statutory exemption.

Essentially, the plaintiffs seek to infer a conspiracy between Edison, Newberg and the union on the basis of the escrow agreement reached between the contractors and the union. Yet, more than this is needed to plead a conspiracy that would remove the alleged agreement from the coverage of the labor exemption.[13]

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[13] While the plaintiffs' complaint could be read to allege the existence of a conspiracy apart from the escrow agreement, such a reading would not be justified. The only factual assertion supporting the plaintiffs' conspiracy claim is the existence of the escrow agreement. The balance of the complaint simply infers a conspiracy from the existence of that agreement and alleges that it was entered into pursuant to "a conspiracy." This is insufficient, however. Mere "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981). *See Larry R. George Sales Co. v. Coal Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979) ("A general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action. The pleader must allege the facts constituting the conspiracy, its object and accomplishment.").

Where plaintiffs base claimed conspiracies solely upon the existence of a collective bargaining agreement concerning subjects of mandatory bargaining,[14] courts have generally held that these allegations are insufficient to remove the statutory exemption from union conduct.[15]

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[14] Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable. The agreement allegedly reached was quite similar to a traditional collective bargaining agreement: it was between an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining—wages. The fact that the final wage was not final, but rather was dependent on an external factor—the size of the wage increase granted by the Trade Associations—does not deprive it of that character. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom . . . to negotiate the terms and conditions of . . . employment," 29 U.S.C. § 102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. § 151.

[15] Where collective bargaining agreements pertain to subjects which are not mandatory subjects of collective bargaining, some courts have held that the agreements can serve as evidence of a conspiracy. Under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." Thus, Justice White's opinion in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), found that where a union and an employer agree on mandatory subjects of bargaining an exemption applies, but the exemption is lost when agreement is reached on such topics as prices, which are not proper subjects of collective bargaining. *See American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 108 (1968); L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 727-28 (1977).

(Footnote continued on following page)

"The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining." *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 558 (9th Cir. 1974).

In *UMW v. Pennington*, 381 U.S. 657 (1965), small mine operators brought an antitrust action against the coal miners' union. The basis of the complaint was that large employers and the union had entered into an industry-wide collective bargaining agreement that imposed a wage scale that small operators would be unable to pay. The plaintiffs claimed that this had been done for the purpose of driving them out of business.

The Court began its analysis by noting, in keeping with *United States v. Hutcheson*, 312 U.S. 219 (1941), that it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." 381 U.S. at 664. The union loses the antitrust labor exemption, however, "when

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[18] *continued*

Here, the collective bargaining agreement concerned itself with wages—explicitly identified as a proper subject of collective bargaining. Thus, the statutory exemption applies. *See Bodine Produce, Inc. v. United Farm Workers Organizing Comm.*, 494 F.2d 541, 551 (9th Cir. 1974) ("Union-imposed restraints which serve purposes closely related to wage, hours, and conditions of employment generally are considered free of *Allen Bradley* taint."). The logic behind this position is clear. "'[C]ollective-bargaining agreements over labor standards inevitably have anticompetitive consequences; to infer from these agreements the necessary elements of a conspiracy to restrain trade under the antitrust laws makes no accommodation for the fact that the national labor policy is based upon the conclusion of these agreements.'" *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 423 n.10 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980) (quoting Comment, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 704 (1968)). *See also* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1203 (1980).

it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665. The Court qualified this statement by noting that

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.*

Id. at 665 n.2 (emphasis added). Thus, the union did not lose its exemption simply by entering into a series of collective bargaining agreements. The agreements alone could not deprive the union of the labor antitrust exemption, absent further evidence of a conspiracy.[16] *Accord, California Dump Truck Owners Association v. Associated General Contractors*, 562 F.2d 607, 611 (9th Cir. 1977) ("An antitrust action based upon the [collective bargaining agreement] alone does not state a claim upon which relief can be granted."). The Court, however, found that the plaintiffs had presented proof of an agreement by the union to seek the same wages from all employers, and thus there was an adequate allegation that the statutory exemption had been forfeited. *Id.* at

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[16] One commentator has distinguished Justice White's opinion in *Pennington* from his opinion in its companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), on this basis. "In *Pennington* the union had openly conspired with a group of employers," while "[i]n *Jewel Tea*, on the other hand, the collective bargaining agreement itself constituted the labor-non-labor combination." Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742, 755 (1966).

669.[17] Here, however, all the assertions of conspiracy are based upon the escrow agreement between the defendants. Thus, the statutory labor antitrust exemption applies, and dismissal of the complaint was proper.[18]

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[17] The Court also found that the nonstatutory exemption did not apply. *See* text accompanying notes 25-27, *infra*.

There is no allegation in the plaintiffs' complaint that the union adopted a "take it or leave it" stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found that this was not the case. *See* note 3, *supra*. Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws.

Furthermore, even if the union had adopted such a position, the plaintiffs would have to allege that this position stemmed from a *shared purpose* with a non-labor group, and was not maintained by a union "'as a matter of its own policy.'" *Ramsey v. UMW*, 401 U.S. 302, 312-13 (1971) (quoting *UMW v. Pennington*, 381 U.S. 657, 664 (1965)).

[18] Further support for this proposition is provided by the Supreme Court's opinion in *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, the Court found that a union representing workers in the building trades violated the antitrust laws by exacting an agreement from a contractor not to subcontract work to firms lacking a collective bargaining agreement with the union. The Court noted that the union had no interest in representing the contractor's employees. Therefore, it noted that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26. This suggests that an agreement would not be sufficient to evince a conspirary where it was only contained in a collective bargaining agreement. *See Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 424 n.19 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979); *Commerce Tankers v. National Maritime Union*, 553 F.2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

The above method of analysis is not uniformly followed, however. Some courts, including the court below, have viewed *Pennington* as a distinct model of analysis imposing a strict series of requirements for finding a collective bargaining agreement to form the basis of an antitrust violation. *See Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 560-61 (9th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546, 553-54 (7th Cir. 1970).[19] These requirements were accurately summarized by the district court below:

> Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose.

Mid-America Regional Bargaining Association v. Will County Carpenters District Council, No. 80 C 1832, slip op. at 4 (N.D.Ill. Feb. 11, 1981). *See also Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980).

The district court noted, and we agree, that under this analysis the plaintiffs failed to allege that the non-labor entities (Newberg and Edison) would *directly* benefit from the restraint. Tying its analysis to the Supreme

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[19] Indeed, *Pennington* is sometimes viewed as a case in which the Supreme Court permitted an allegation of conspiracy to be based *solely* on an agreement concerning a subject of mandatory bargaining. *See, e.g.*, St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 621 (1976).

Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the district court correctly found that the primary effect of the agreement was on wage scales, and thus any benefit to non-labor entities would be indirect. *Mid-America Regional Bargaining Association v. Will County Carpenters District Council*, *supra* at 5.[20] Since any anti-competitive effect resulted "from the elimination of wage competition," the labor exemption covered the alleged agreement. *Id.* at 5-6.

Although the district court did not find it necessary to look beyond the question of direct impact on the business market, we note that the plaintiffs' complaint also fails to properly plead a *concerted anti-competitive purpose*. This requires a shared purpose between the union and non-labor entities to restrict competition. The complaint here, however, alleges three *different* purposes for the agreement reached among the parties. The union allegedly entered the agreement to weaken the resistance of contractors to its wage demands (¶41(d)). Edison allegedly agreed to subsidize the agreement in order to maintain production on its generating stations (¶40(d)). Finally, Newberg allegedly entered into the agreement in order to force a ruinous wage increase and thereby gain an unlawful competitive advantage (¶41(e)).

These pleadings fail on two levels to demonstrate a concerted anti-competitive purpose. First, it is clear that each party had a separate and distinct purpose—there simply was no single shared purpose.[21] Second, the only

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[20] This approach tends to result in combining what the Supreme Court in *Connell* noted were two separate analyses. The court below thus seemed to base its decision on a combination of statutory and nonstatutory exemption grounds. While the court looked to specific statutes, its analysis of impact on the labor and business markets is identified in *Connell* as analysis appropriate to determining whether there is a basis for a nonstatutory exemption.

[21] The complaint alleges that each party *knew* the likely results of its actions and, therefore, intended them. This is not

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anti-competitive purpose alleged was possessed by Newberg. Yet the complaint fails to plead even this interest properly, for it alleges that Edison agreed to "pressure" its contractors into signing the escrow agreement with the union (¶40). Thus, the complaint alleges that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. This pleading is clearly inadequate to fall within the *Pennington* model. *See Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers*, 362 F.2d 322, 326 (5th Cir. 1966).

The plaintiffs' complaint, therefore, failed to properly allege a conspiracy between the defendants in this case that would remove the complained of acts from the scope of the statutory labor exemption.[22] The district court properly dismissed the complaint.

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[22] *continued*
enough, absent an allegation of *purpose*, to plead a cause of action under *Pennington*. As the court in *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (5th Cir. 1974), noted:

> A rule of law requiring a lower level of intent than purpose would open the way to disastrous incursions upon Congressionally-sanctified areas of labor union activity. When a union imposes a collective bargaining agreement upon Company X, it will always advantage X by forcing the same agreement on competitor Company Y which theretofore offered less advantageous terms and working conditions. This is a fact of commercial life known to all unions. But if possession of that knowledge should mean that the union had to tread warily in negotiating with Y, refraining from striking, for example, or from taking a rigid bargaining stance for fear of losing the antitrust exemption, labor policy would be stood on its head.

[22] Although both the statutory and the nonstatutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemptions would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other

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Even were we to find that the complaint contained adequate allegations of conspiracy to remove this case from the statutory labor exemption, this would not be dispositive. Where a complaint properly alleges a conspiracy between a union and non-labor entities, a nonstatutory antitrust exemption may still apply. This is true of this case.

The foundations of the nonstatutory exemption are not as easily identifiable as those of the statutory exemption. The origins of the exemption, however, are generally traced to Chief Justice Stone's opinion in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). *See, e.g., Consolidated Express, Inc. v. New York Shipping Association, Inc.*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).[2] In *Apex Hosiery*, the Court found that a violent strike, which inevitably interfered with the flow of the employer's goods in interstate commerce, was not actionable under the Sherman Act. Although the Court examined the statutes underlying the statutory exemption, it did not base its decision upon the statutory exemption. Instead, it held that because the plaintiffs had failed to show that the union's actions had been intended to operate, and had operated, as substantial restraints on *commercial competition*, no claim was stated under the Sherman Act.

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[1] *continued*

circuits have concurred in this judgment. "To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption." *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974). *See also Amalgamated Meat Cutters & Butchers Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[2] Others place the genesis of the nonstatutory exemption much later, with the Supreme Court's decision in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). *See, e.g., California Dump Truck Owners Ass'n v. Associated Gen. Contractors*, 562 F.2d 607, 611 (9th Cir. 1977).

The Court contrasted restraints on commercial competition with restraints on the market for labor. "It would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or restraints in restraint of trade or commerce under the Sherman Act." *Id.* at 503. While *Apex Hosiery* appeared to rest on the ground that substantive liability under the Sherman Act did not attach to the union activities complained of, later courts and commentators have viewed the case as establishing a nonstatutory exemption from Sherman Act coverage for restraints acting primarily upon the labor market. *See, e.g., Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 901 (1980); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1196-97 (1980).[24]

This exemption was more explicitly developed by Justice White's opinion in *UMW v. Pennington*, 381 U.S. 657 (1965), and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).[25] In *Pennington*, after finding the statutory exemption inapplicable to an

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[24] There is some question whether *Apex Hosiery* represents a finding of a lack of substantive liability as opposed to a finding that the conduct was exempted. Thus, one author states in one part of an article that "the actual holding" of *Apex Hosiery* "was that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike," and in another that "the nonstatutory exemption apparently originated" in *Apex Hosiery*. St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 606, 618 n.64 (1976). While Justice Douglas decried the tendency to confuse the questions of liability and exemption, *Ramsey v. UMW*, 401 U.S. 302, 314 (1971) (Douglas, J., dissenting), much of the analysis of *Apex Hosiery* has been adopted in examining the nonstatutory exemption. *See, e.g., UMW v. Pennington*, 381 U.S. 657, 666 (1965).

[25] While Justice White did not write for a majority of the Court in *Pennington* or *Jewel Tea*, the Court has since looked to his opinions as authoritative expositions of the nonstatutory exemption. *See Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975).

alleged conspiracy between mine operators and the union to impose a ruinous wage scale on small mine operators,[26] Justice White's opinion for the Court enunciated what is now known as the "nonstatutory exemption." *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975). Justice White looked to "national labor policy" as expressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to determine whether anything in the Act conflicted with his conclusion that the union's agreement was a proper subject of antitrust scrutiny. 381 U.S. at 666. He found that national labor policy was, in fact, violated by an agreement which "strait-jacketed" the union into an agreement to seek higher wages than an employer could afford. *Id.* The Court compared this agreement with other illegal agreements where "the restraint on the product market is direct and immediate." *Id.* at 663. The effect of this agreement was to limit the union's freedom to act in its self-interest while furthering the employers' goal of elimination of competition. *Id.* at 666-67. Such an agreement was contrary to national labor policy and thus not entitled to any exemption from antitrust liability. *See* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1207 (1980). The Court emphasized that industry-wide collective bargaining, on the other hand, was permissible because "the effect on the product market, though clearly present, results from the elimination of competition based on wages among employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664.

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*, the Court held that a union did not violate the antitrust laws by seeking and obtaining a collective bargaining agreement with retail stores which prohibited the sale of meat between six at night and nine in the morning. Justice White's opinion[27] suggested

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[26] *See* text accompanying notes 15-17, *supra*.

[27] Justice White's opinion received the votes of only two other Justices. There was no opinion of the Court.

that, although there was no allegation of conspiracy in the case, this did not automatically bestow an antitrust exemption upon the challenged agreement. *Id.* at 688-89.

Although this position seems to conflict with earlier statutory exemption cases, it can be reconciled with them when the nature of the agreement is considered. Justice White noted that "[e]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689.[28] An agreement on such subjects, presumably, would receive the statutory exemption. Some agreements on nonmandatory subjects, such as price scales, however, could violate the antitrust laws. Since the agreement at issue in *Jewel Tea* fit neither category directly, it became necessary to examine whether an exemption based on policy rather than statutory language would apply:

> [T]he issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*

Id. at 689-90 (emphasis added) (footnote omitted). In a footnote, the opinion made it clear that the "crucial determinant" was whether the agreement had a direct impact on labor interests or "the labor market." *Id.* at 690 n.5. Thus, *Jewel Tea*, in conjunction with *Pennington*, suggests the existence of a labor exemption to the antitrust laws whose boundaries were determined by attempting an accommodation between national labor policy and antitrust laws, which was reached in turn by

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[28] 29 U.S.C. § 158(a)(5) imposes a duty upon employers to engage in collective bargaining with employees.

an examination of the impact of a given agreement on the labor and product markets.[29]

This interpretation was confirmed by the Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, a general contractor sought to invalidate an agreement between the contractor and the union whereby the contractor agreed to deal with mechanical subcontractors only if they were parties to the union's multiemployer collective bargaining agreement. The Court began its analysis by noting that the statutory exemption does not exempt "concerted action or agreements between unions and nonlabor parties." *Id.* at 622. Nevertheless, the Court noted that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in the business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*

The Court hinged its determination on whether the agreement between the union and the employer was a "direct restraint on the business market," as opposed to an indirect restraint that would "follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. Because the union in *Connell* imposed "direct restraints on the business market" by limiting which subcontractors could receive the business of the contractor, the Court found that no exemption

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[29] A more general statement is that "the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey v. NFL*, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (citations omitted). The *Connell* labor-business market distinction appears to serve as a generally applicable standard for making this determination. *Id.* at 614. Where an agreement primarily affects the labor market, the policy favoring collective bargaining is preeminent, but when an agreement has a direct impact on the business market, the antitrust laws are of greater concern.

applied. *Id.* at 623. *Connell* is thus consistent with the *Apex Hosiery* mode of analysis—finding a nonstatutory exemption for restraints on the labor market which might indirectly affect the business market, but denying the exemption for direct restraints on the business market.[20]

This is the interpretation of the nonstatutory exemption adopted by the court in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 901 (1980). There the court explained that "[t]he term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." *Id.* at 513. Thus, "the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act." *Id.* at 514. The *Consolidated Express* court recognized, therefore, that the central examination in *Connell* was whether there was a direct restraint on business. *Id.* at 517. *See also Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

Thus, a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. Restraints operating primarily upon the business market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the plaintiffs' complaint in light of the nonstatutory exemption demonstrates that the district court

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[20] The *Connell* opinion's use of the term "business market" instead of "product market" was not, apparently, indicative of a change in the Court's approach. 421 U.S. at 622.

properly dismissed the plaintiffs' complaint. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

It is difficult to imagine a case in which the alleged agreement concerned wages more directly than the complaint here.[31] The crux of the complaint is an allegation that Newberg agreed to pay as much as a $2.25 per hour wage increase, depending on what other contractors did. The plaintiffs allege that the union knew that the effect of this agreement would be to cause other employers to offer a retroactive wage increase equal to the maximum contemplated by the union's agreement with Newberg. The restraint thus alleged is not a "direct restraint on the business market" but rather a direct restraint on the labor market, with only tangential effects on the business market. Any possible harm to the plaintiffs would "follow naturally from the elimination of competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975). Thus, the nonstatutory exemption would apply in this case.

III

We conclude that the district court correctly dismissed the plaintiffs' complaint. Both the statutory and nonstatutory labor exemptions served to immunize the

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[31] The Supreme Court has taken a broad view of what constitutes an agreement with a direct impact on the labor market. Thus, in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), the Supreme Court examined a state antitrust challenge to a collective bargaining agreement. The agreement provided for a minimum wage scale for truck drivers and, to prevent evasion, included a provision that drivers who owned and operated their own vehicles would be paid a prescribed rental for their vehicles in addition to the required wage. The Supreme Court found that the state antitrust laws could not be applied. The Court found that the agreement was one directly affecting wages, and not "'a remote and indirect approach to the subject of wages.'" *Id.* at 298.

defendants' activities from antitrust liability. The order of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and U.S. HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

MEMORANDUM OPINION AND ORDER

Plaintiffs, Mid-America Regional Bargaining Association ("MARBA"), the Contractors Association of Will and Grundy Counties ("CAWGC"), the Residential Construction Employers Council ("RCEC"), the Joliet Construction Company and U.S. Home Corporation have brought a three-count complaint charging defendants Will County Carpenters District Council ("Will County"), United Brotherhood of Carpenters and

Joiners of America (AFL-CIO) ("District Carpenters"), Commonwealth Edison Company ("Edison"), and Gust K. Newberg Construction Company ("Newberg") with unlawful combination and conspiracy in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. §1, interference with contractual relationships and civil conspiracy.

The specific allegations stem from the following: Plaintiffs MARBA, CAWGC and RCEC are not-for-profit corporations engaged in the business of representing commercial and residential contractors in collective bargaining agreements. Joliet and U.S. Home are contractors, members of the plaintiff associations, who have delegated the responsibility for negotiating collective bargaining agreements with their employees to the plaintiff associations.

According to the complaint, the collective bargaining agreements which had been in effect between the plaintiff associations and the District Carpenters expired on June 1, 1979. In early July, construction work in Will County, with the exception of work on Edison projects at Braidwood and Romeoville, was halted by work stoppages. During these work stoppages, the plaintiff associations and District Carpenters continued their collective bargaining.

The complaint then alleges that in July, 1979, the defendants entered into an escrow agreement, outside the collective bargaining process, which imposed artificially high construction costs on every Will County contractor employing union carpenters. Under the terms of the alleged agreement, Newberg, an employer of a substantial number of Will County union carpenters because of Newberg's contract to work at the two Edison plants, would put $2.25 per hour for each hour union carpenters worked on or after June 1, 1979, into an escrow account. Edison, a "stranger" to the union-employer relationship, allegedly instigated this arrangement and subsidized Newberg's payments. Moreover, plaintiffs contend that the escrow agree-

ment applied to approximately twenty-five percent of the relevant market. Its effect, they assert, was to directly and irrevocably raise the minimum level of carpentry costs by twenty percent and to undermine the collective bargaining process in Will County.

This cause is presently before the court on the motions of several defendants to dismiss.[1] However, this court will limit its discussion to the issues raised in Edison's brief. We do so because the issues raised therein are dispositive of the case.

Edison bases its motion to dismiss on several theories. Chief among them is the assertion that plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed.R.Civ.P., in that sections 6 and 20 of the Clayton Act, 15 U.S.C. §17 and 29 U.S.C. §52, and the Norris-LaGuardia Act, 29 U.S.C. §§104, 105, and 113, which constitute the labor exemption to the antitrust laws, serve to exempt the defendants from the instant cause. The purpose of the labor exemption is to "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the operation of the antitrust laws." *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 621-22 (1975).

Edison maintains that the instant cause fits within the labor exemption because the only direct restraint alleged in the complaint is that of a restraint in the market for human labor—which is specifically exempted by section 6 of the Clayton Act. *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940). Edison contends further that the complaint contains no allegations that the alleged activities of the defendants resulted in a direct restraint of the business market, the effect of which would be to deprive defendants of the protection afforded by the labor exemption.

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[1] In addition to Edison's motion, District Carpenters filed a motion to dismiss or, in the alternative, for summary judgment. Newberg filed a motion to dismiss with accompanying "suggestions" in support of its motion, but it also adopted Edison's memoranda in support of the latter's motion to dismiss.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court articulated guidelines for determining when an agreement between a union and a non-labor group to restrain the market for human labor is no longer exempted from antitrust litigation. *See also Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir. 1980). Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose. *Id.* at 665-69.

Plaintiffs admit that they have modeled their complaint after *Pennington* "in certain respects." Plaintiffs Memorandum in Opposition to Motions to Dismiss at 27. However, that complaint is noticably deficient in one respect. The plaintiffs fail to establish that the activities of Will County and District Carpenters were at the behest of, or in combination with, Edison and Newberg (entities which occupy positions in the competitive structure) so that the latter defendants directly benefit from the restraint. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) serves to shed more light on the complicated interface between the areas of antitrust and labor law. There, the defendant union forced the plaintiff general contractor to enter into an agreement the effect of which was to impose a *direct restraint* on competition among subcontractors who employed union members. The Court held that the union, by agreement with several contractors, had rendered non-union subcontractors ineligible to compete for a portion of

available work. *Id.* at 625. "This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.*

A restraint of this sort is not alleged here. The facts in the instant complaint allege only a direct restraint on the labor market. Edison concedes that a wage agreement may have an anticompetitive effect. However, that effect stems from the elimination of wage competition and is consequently protected from antitrust litigation by the labor exemption.

Included in our consideration is the recent decision of the Circuit Court of Appeals for the Ninth Circuit, *California State Council of Carpenters v. Associated General Contractors of California,* No. 77-2323 (9th Cir. Nov. 20, 1980) that plaintiffs offer in opposition to defendants' motions. In *California Council,* the unions argued that the defendants, members of a construction industry employers organization, conspired to coerce property owners, general contractors and others to hire only contractors and subcontractors who had not signed agreements with the unions. Unlike the case at bar, there, the plaintiffs contended that the employers conspired to impose a *direct* restraint on the business market. The Ninth Circuit refused to apply the statutory labor exemption. *Id. California Council* is inapposite here because it involves a direct restraint on the business, not labor, market.

In conclusion, the court finds that the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market. As the direct restraint imposed here is not a direct restraint on the business market, but a direct restraint on

the labor market, plaintiffs can plead no cause of action upon which relief can be granted. Accordingly, the motions of the various defendants to dismiss are granted; the case is dismissed.

ENTER:

/s/ FRANK J. MCGARR
Frank J. McGarr
United States District Judge

DATED: February 11, 1981

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CIVIL ACTION FILE NO. 80 C 1832

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the case is dismissed.

Dated at Chicago, Illinois, this 11th day of February, 1981.

APPENDIX C

Received
April 15, 1980
H. Stuart Cunningham, Clerk
United States District Court

JUDGE McGARR

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and US HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

COMPLAINT

Plaintiffs, by their attorneys, complain of Defendants as follows:

COUNT I—ANTITRUST

JURISDICTION AND VENUE

1. This action is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for injunctive relief and to recover damages which Plaintiffs have sustained by reason of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 and under principles of pendent jurisdiction to recover damages which Plaintiffs have sustained by reason of Defendants' violation of the common law of the State of Illinois.

2. Defendants maintain offices, transact business and/or are found within this district. Many of the unlawful acts hereinafter alleged were performed within this district, the interstate trade and commerce hereinafter described is carried on in part within this district, and the claims hereinafter asserted arose within this district.

THE PARTIES

Plaintiffs

3. Plaintiff Mid-America Regional Bargaining Association ("MARBA") is a not-for-profit Illinois corporation with its offices at 228 North LaSalle Street, Chicago, Illinois. MARBA engages, *inter alia*, in the business of representing, pursuant to delegated authority, contractors performing industrial and commercial construction work ("commercial contractors"), throughout the Chicago Metropolitan Area, in collective bargaining negotiation of agreements with construction trade unions.

4. Plaintiff Contractors Association of Will and Grundy Counties ("CAWGC") is a not-for-profit Illinois corporation with its offices at 254½ Ruby Street, Joliet, Illinois. CAWGC

engages, *inter alia*, in the business of representing commercial contractors in Will and Grundy Counties in collective bargaining negotiation of agreements with construction trade unions. CAWGC is the sole and exclusive bargaining representative for approximately 50 commercial contractors who employ carpenters represented by Defendant Will County Carpenters District Council. CAWGC has delegated to MARBA its responsibility to negotiate collective bargaining agreements on behalf of its contractor members.

5. Plaintiff Residential Construction Employers Council ("RCEC") is a not-for-profit Illinois corporation with its offices at 1010 Jorie Boulevard, Oak Brook, Illinois. RCEC engages, *inter alia*, in the business of representing contractors performing residential construction work ("residential contractors") throughout the Chicago Metropolitan Area in collective bargaining negotiation of agreements with construction trade unions. RCEC is the sole and exclusive bargaining representative for approximately 170 residential contractors, approximately 20 of whom employ carpenters represented by Defendant Will County Carpenters District Council.

6. Plaintiff Joliet Construction Co. ("Joliet") is a commercial contractor with its offices at 301 Republic Avenue, Joliet, Illinois. Joliet engages in the construction business in Will County, Illinois and surrounding counties. Joliet is a member of CAWGC and has delegated to CAWGC and MARBA the responsibility to negotiate collective bargaining agreements with its employees and has agreed to be bound by the agreements so negotiated.

7. Plaintiff US Home Corporation ("US Home"), is a Delaware Corporation. The Illinois Communities Division of US Home ("Illinois Communities") is a residential contractor with its offices at 475 Frontage Road, Burr Ridge, Illinois. Illinois Communities engages in the construction business in Will County, Illinois and surrounding counties. US Home is a

member of RCEC and has delegated to RCEC the responsibility to negotiate collective bargaining agreements with employees of Illinois Communities and has agreed to be bound by the agreements so negotiated.

Defendants

8. Defendant Will County Carpenters District Council ("District Carpenters") is an unincorporated association with its offices at 2112 West Jefferson Street, Joliet, Illinois. District Carpenters engages in representing approximately 750 carpenter members within its territorial and occupational jurisdictions with respect to wages, hours and working conditions.

9. Defendant United Brotherhood of Carpenters and Joiners of America ("International Carpenters") is an unincorporated labor organization with its offices at 101 Constitution Avenue N.W., Washington, D.C. District Carpenters has been granted a Charter by International Carpenters and is subject to International Carpenters' Constitution and Bylaws.

10. Defendant Commonwealth Edison Company ("Commonwealth Edison") is an Illinois corporation having its offices at One First National Plaza, Chicago, Illinois.

11. Defendant Gust K. Newberg Construction Co. ("Newberg") is an Illinois corporation having its offices at 2040 North Ashland Avenue, Chicago, Illinois. Newberg engages in the commercial construction business throughout the Chicago Metropolitan Area, including Will County. Newberg Construction is not a member of CAWGC or MARBA.

TRADE AND COMMERCE

12. Carpentry work is an indispensible segment of the construction industry. The construction of any utility plant, home, office building, hospital, library, hotel, industrial plant, restaurant, or other public or private structure cannot be

completed without the necessary carpentry work being performed. Carpentry work and the cost thereof substantially involve and affect the flow of goods and services in interstate commerce in every part of the United States.

13. Plaintiff Joliet regularly and routinely purchases, uses, and handles materials and equipment transported in interstate commerce. The total volume of purchases of such materials and equipment is substantial.

14. Plaintiff US Home regularly and routinely purchases, uses and handles materials and equipment transported in interstate commerce. The total volume of purchases of such materials and equipment is substantial.

15. Plaintiffs MARBA and CAWGC represent, through delegated authority, approximately 50 commercial contractors who engage, *inter alia,* in carpentry work and employ carpenters in Will County. Several commercial contractor members of CAWGC have their headquarters outside the State of Illinois.

16. Plaintiff RCEC represents, through delegated authority, approximately 170 residential contractors who engage, *inter alia,* in carpentry work. Approximately 20 of the residential contractors represented by RCEC employ carpenters in Will County. Several residential contractor members of RCEC have their headquarters outside the State of Illinois.

17. MARBA and CAWGC are engaged, *inter alia,* in the business of representing employers in collective bargaining. In the course of their businesses, MARBA and CAWGC and their employees travel, perform services, obtain property, make purchases, receive revenues and engage in other activities in and affecting interstate commerce.

18. RCEC is engaged, *inter alia,* in the business of representing employers in collective bargaining. In the course of its business activities, RCEC and its employees travel and

perform services, obtain property, make purchases, receive revenues and engage in other activities in and affecting interstate commerce.

19. Plaintiffs MARBA, CAWGC and RCEC regularly and routinely purchase, use and handle materials and equipment transported in interstate commerce. The total dollar volume of purchases of such materials and equipment by Plaintiffs is substantial.

20. The unlawful restraints which are the subject matter hereof substantially affect the flow of goods and services in interstate commerce.

BACKGROUND FACTS

21. MARBA, on behalf of CAWGC and the individual contractor members of CAWGC, and RCEC, on behalf of its individual contractor members, historically have negotiated and entered into collective bargaining agreements with District Carpenters establishing rates of pay, hours and other conditions of employment for all union carpenters performing work for commercial and/or residential contractors in Will County.

22. After agreement is reached between MARBA and District Carpenters, all commercial contractors employing union carpenters in Will County customarily sign collective bargaining agreements incorporating terms substantially identical to those agreed to between MARBA and District Carpenters.

23. After agreement is reached between RCEC and District Carpenters, all residential contractors employing union carpenters in Will County customarily sign collective bargaining agreements incorporating terms substantially identical to those agreed to between RCEC and District Carpenters.

24. In 1976, MARBA and RCEC negotiated collective bargaining agreements with District Carpenters (the "1976 Agreements"). The 1976 Agreements were due to expire on May 31, 1979.

25. In March of 1979, District Carpenters notified the members of CAWGC and RCEC that District Carpenters intended to seek changes from the terms set forth in the 1976 Agreements.

26. Promptly thereafter, MARBA and RCEC attempted to engage in collective bargaining negotiations with District Carpenters in an effort to reach agreement with respect to wages, hours and other conditions of employment to be incorporated into collective bargaining agreements to replace the 1976 Agreements.

27. On or about May 24, 1979, District Carpenters gave notices to the Federal Mediation and Conciliation Service to commence the required thirty-day waiting period prior to a strike.

28. Despite good faith efforts by MARBA and RCEC to negotiate new collective bargaining agreements with District Carpenters, no such agreements were reached as of June 1, 1979.

29. On or about July 2, 1979, District Carpenters directed that its employee members engage in selective picketing and strikes against certain contractor members of MARBA, CAWGC and RCEC, while continuing to work for other contractor members of MARBA, CAWGC and RCEC. To counteract the "whip-saw" effects of such selective strikes, MARBA, CAWGC and RCEC, on or about July 6, 1979, directed their contractor members who were not being struck or picketed by the District Carpenters to engage in a defensive lockout of all District Carpenter members.

30. Defendant Commonwealth Edison is a large public utility which, at the time of the strike and lockout referred to above, had contracted with Defendant Newberg for Newberg's performance of construction work at a nuclear generating facility under construction in Braidwood in Will County, and for Newberg's performance of certain construction work at an existing electrical generating facility in Romeoville in Will County (the "Commonwealth Projects").

31. Newberg employed approximately 190 carpenters on the Commonwealth Projects, which constituted approximately 25% of the total of approximately 750 carpenters represented by District Carpenters at the time of the strike described above.

32. Morrison Construction Co. ("Morrison") is a commercial contractor which performed work on the Commonwealth Projects, employing at least one District Carpenter member to work on said Projects. Morrison also performs considerable contracting work for Commonwealth Edison on projects other than the Commonwealth Projects.

33. Getschow Construction Company ("Getschow") is a commercial contractor which performed work on the Commonwealth Projects, employing District Carpenter members on such Projects.

34. Because District Carpenters, MARBA and RCEC had not reached agreement on the terms of a collective bargaining agreement to replace the 1976 Agreements, the Commonwealth Projects, and substantially all other commercial and residential construction projects employing union carpenters in Will County, were subject to strikes or lockouts commencing during July, 1979.

35. A relatively small proportion of Newberg's total business activities take place in Will County; however, primarily by reason of Newberg's work on the Commonwealth Projects, at all relevant times Newberg was by far the major employer of carpenters represented by District Carpenters.

VIOLATIONS CHARGED

36. Beginning on a date unknown to Plaintiff, but prior to July 26, 1979, and continuing to on or about August 20, 1979, District Carpenters, Carpenters International, Newberg and Commonwealth Edison entered into unlawful contracts, combinations and conspiracies to utilize the unique positions of Commonwealth Edison, a non-labor party, and Newberg to (a) increase the price of carpentry services in Will County; and (b) fix and impose artificially high carpentry costs at non-competitive levels retroactively in Will County thereby injuring Plaintiffs in their business and property; and (c) interfere with the rights of MARBA, CAWCG and RCEC to engage in their respective businesses. Such contracts, combinations and conspiracies were in restraint of trade and commerce in violation of Section 1 of the Sherman Act, all is as more fully set forth hereafter.

37. As a regulated public utility and a short-term purchaser of substantial carpentry services in Will County, Commonwealth Edison was not subject to the competitive constraints that typically are important in the collective bargaining process because, among other things, Commonwealth had an expectation that it would be able to effectively pass on any increased construction cost on the Commonwealth Projects to the public and, as a short-term purchaser of substantial carpentry services in Will County, Commonwealth Edison was not seriously concerned about the long-term level of costs for those services.

38. By reason of its limited activities in Will County, except for increased costs related to the Commonwealth Projects, Newberg had little incentive, except with regard to costs on the Commonwealth Projects, to engage in effective collective bargaining with District Carpenters.

39. By reason of their respective situations as set forth in paragraphs 37 and 38 above, coupled with the unlawful coercion and/or subsidization described at paragraph 40 below, neither Newberg nor Commonwealth Edison were subject to the normal competitive pressures with respect to payments for carpentry services to which Joliet and US Home were subject and had little incentive to engage in good faith arms-length bargaining with District Carpenters.

40. On information and belief, on or about July 26, 1979, Defendants International Carpenters, District Carpenters, Newberg and Commonwealth Edison entered into an agreement whereby the unique non-competitive position of Commonwealth Edison was used, together with its unique resources and position and its considerable power as a purchaser, to unlawfully fix carpentry wages and construction costs in Will County at artificially high levels to the injury of Plaintiffs. Such agreement included the following:

(a) Commonwealth Edison, a non-labor entity, agreed with District Carpenters and International Carpenters that Commonwealth Edison would pressure Newberg, Morrison and Getschow to agree to District Carpenters' demands for artificially high retroactive wage increases for carpenters working on the Commonwealth Projects;

(b) Commonwealth Edison agreed to subsidize increased costs to Newberg, Morrison and Getschow which would result from such support;

(c) Pursuant to such pressure and subsidization, Newberg, Morrison and Getschow agreed with Commonwealth Edison, District Carpenters and International that retroactive to June 1, 1979, $2.25 per hour would be placed into an escrow for each hour of work performed by their Will County carpenter employees; and

(d) District Carpenters and International Carpenters agreed that District Carpenters' members would work on the Commonwealth Projects, whereas in the absence of said unlawful agreement, the strike then being conducted at the Commonwealth Projects would have continued until a collective bargaining agreement was negotiated.

41. Defendants knew and intended that the effects of the unlawful arrangements described above, by virtue of their application to approximately 25% of the employees represented by District Carpenters, would be to

(a) require MARBA, CAWGC and RCEC and the commercial and residential contractors represented by them to agree to retroactivity to June 1, 1979 in any agreements subsequently reached with District Carpenters;

(b) artificially fix a minimum increased wage scale of $2.25 per hour during the next year for carpentry work in Will County, constituting an approximate 20% increase;

(c) damage MARBA, CAWGC, RCEC, Joliet and US Home in their respective businesses and property;

(d) permit District Carpenters and International Carpenters to gain an unfair competitive advantage, through Commonwealth Edison's coercion and subsidization, over other parties to the collective bargaining process;

(e) unlawfully favor Newberg, Morrison and Getschow over other employers in Will County; and

(f) irreparably injure the prestige and reputation of MARBA, CAWGC and RCEC.

42. On or about August 20, 1979, MARBA and RCEC agreed to terms with District Carpenters as described in subparagraphs 41(a) and (b) above.

UNLAWFUL EFFECTS

43. The effects of the combinations and agreements described above has been

(a) to injure Joliet and US Home in their businesses by compelling them to pay wages in excess of the wages which would have been negotiated in good faith absent the unlawful conspiracy by Defendants;

(b) to cause Joliet and US Home to incur substantially increased costs and sustain losses and/or decreased profits by reason of the artificially high and retroactive wage increases resulting from Defendants' unlawful conspiracy;

(c) to injure MARBA, CAWGC and RCEC in their business by irreparably damaging their ability to retain or attract contractor members; and

(d) to injure the prestige and reputation of MARBA, CAWGC and RCEC.

44. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

A. That the aforesaid combination and conspiracy in restraint of trade be adjudged and decreed to be in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

B. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert with them, be enjoined and restrained from combining, con-

spiring or agreeing to restrain trade in the manner alleged herein, and from implementing the unlawful agreements reached pursuant thereto.

C. That a judgment be awarded to Plaintiffs and each of them, for threefold and damages sustained by reason of Defendants' violations of the Sherman Act, plus the cost of this suit, including attorneys' fees.

D. That this Court award such other relief to Plaintiffs as may be just and proper.

COUNT II—UNLAWFUL INTERFERENCE

1-44. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations contained in paragraphs 1 through 44 of Count I of this Complaint as paragraphs 1 through 44 of this Count II.

45. Defendants knew that MARBA was, at all relevant times, the exclusive bargaining representative for CAWGC and, by delegation, the members of CAWGC and that RCEC was, at all relevant times, the exclusive bargaining representative for the members of RCEC.

46. Defendants knew that the effect of their conduct and agreements described above would be to utterly frustrate any attempts by MARBA and RCEC to negotiate agreements with District Carpenters on terms different from those effectively agreed to among Defendants and that MARBA and RCEC would, as a result of Defendants' conduct and agreements, be prevented from fulfilling their contractual obligations to effectively collectively bargain on behalf of the employers represented by them.

47. Defendants knew that the effect of their conduct and agreements described above would be to injure the reputations of MARBA, CAWGC and RCEC and damage the abilities of MARBA, CAWGC and RCEC to retain and attract members and otherwise engage in their respective businesses.

48. Defendants knew that the effect of their conduct and agreements described above would be to induce various members of MARBA, CAWGC and RCEC to breach their contractual obligations to MARBA, CAWGC and RCEC.

49. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification interfered with MARBA's fulfillment of its contractual obligation to represent CAWGC in bargaining with District Council.

50. By their conduct and agreements described above, Defendants knowingly and intentionally and without legal justification interfered with CAWGC's fulfillment of its contractual obligation to represent its members in collective bargaining.

51. By their conduct and agreements described above, Defendants knowingly and intentionally and without legal justification interfered with RCEC's fulfillment of its contractual obligation to represent its members in collective bargaining.

52. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of CAWGC to breach their contractual obligations to CAWGC.

53. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of MARBA to breach their contractual obligations to MARBA.

54. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification induced members of RCEC to breach their contractual obligations to RCEC.

55. By their conduct and agreements described above, Defendants knowingly and intentionally and without lawful justification interfered with the prospective business advantages of MARBA, CAWGC and RCEC.

56. As a result of Defendant's unlawful conduct, MARBA, RCEC and CAWGC have been seriously damaged in the following respects:

(a) The contractual obligations of MARBA, CAWGC and RCEC to represent their members have been interfered with;

(b) MARBA, CAWGC and RCEC have lost members;

(c) Members of MARBA, CAWGC and RCEC have breached their contractual obligations to MARBA, CAWGC and RCEC;

(d) MARBA, CAWGC and RCEC have been injured in their valuable goodwill and business reputations;

(e) MARBA, CAWGC and RCEC have been injured in their abilities to retain and attract members; and

(f) MARBA, CAWGC and RCEC have been injured in their business.

57. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs MARBA, CAWGC and RCEC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs MARBA, CAWGC and RCEC pray:

A. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert

with them, be enjoined and restrained from interfering, in the manner alleged herein, with contractual relations between MARBA, CAWGC and RCEC and their respective members and from interfering in the manner alleged herein, with prospective business advantages of MARBA, CAWGC and RCEC;

B. That a judgment be awarded to Plaintiffs, and each of them, for damages sustained by reason of Defendants' unlawful actions plus the cost of this suit, including attorneys' fees;

C That punitive damages in the amount of $1,000,000 be awarded to each of MARBA, CAWGC and RCEC; and

D. That this Court award such other relief to Plaintiffs as may be just and proper.

COUNT III—CIVIL CONSPIRACY

1-44. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations contained in paragraphs 1 through 44 of Count I of this Complaint as paragraphs 1 through 44 of this Count III.

45-57. Plaintiffs MARBA, CAWGC and RCEC repeat and reallege the allegations of paragraphs 45-57 of Count II of this Complaint as paragraphs 45-57 of this Count III.

58. By their conduct and agreements described above, Defendants knowingly and intentionally, and without legal justification, conspired to injure MARBA, CAWGC and RCEC in their respective businesses and to destroy the abilities of MARBA, CAWGC and RCEC to engage in their respective businesses.

59. As a result of the conspiracies alleged above, MARBA, CAWGC and RCEC have been injured in their respective businesses.

60. The unlawful conduct of Defendants, unless restrained and enjoined by an order of this Court, will cause irreparable continuing injury, damage and loss to Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

A. That Defendants and each of their officers, directors, agents, representatives, employees, and all persons and corporations acting or claiming to act on their behalf, or in concert with them, be enjoined and restrained from continuing or reinstituting, in the manner alleged herein, their unlawful conspiracy to injure MARBA, CAWGC and RCEC;

B. That a judgment be awarded to Plaintiffs, and each of them, for damages sustained by reason of Defendants' unlawful actions plus the cost of this suit, including attorneys' fees;

C. That punitive damages in the amount of $1,000,000 be awarded to each of MARBA, CAWGC and RCEC; and

D. That this Court award such other relief to Plaintiffs as may be just and proper.

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APPENDIX D

The Affidavit of William Sidell, General President of United Brotherhood of Carpenters and Joiners of America during 1979, executed on June 26, 1980, provides in relevant part:

"9. I was also present at a second meeting with respect to the wage demands of the Will County District Council referred to above. The second meeting was held in Chicago, Illinois on August 6, 1979. Present at that meeting, in addition to myself, to the best of my knowledge and belief, were Dick Pepper of Pepper Construction Company and Paul Cocose of Mayfair Construction representing the Builders Association of Chicago; Art Kleinrath of Commonwealth Edison and Bill McCabe, Executive Secretary of MARBA (Mid America Regional Bargaining Association). I understand the meeting was requested by MARBA.

"10. At the meeting referred to in paragraph 9, above, the employer representatives referred to the unreasonable wage demands being made by the Will County District Council and Mr. George Perinar and stated that if such demands had to be met it would destroy the whole building industry in the area and stop a lot of construction. I advised them that I understood the situation, that it was not the first time we had had trouble with the Will County District Council and that I was doing everything in my power to alleviate the situation. I told them that a meeting had been set up in Washington, D.C. by Mr. Konyha and that hopefully it would result in moderation of the Will County District Council wage demands. I had not at that time received any report as to the meeting held on August 3, 1979. At the time of the meeting in Chicago it was my understanding that an agreement had been made by Commonwealth Edison with the Will County District Council to pay retroactively whatever wage increase was negotiated with the local contractor group and to deposit $2.25 per hour worked (the first step wage increase) in an

escrow account to guarantee such payment. A copy of a letter dated August 1, 1979 addressed to me by Mr. Kleinrath of Commonwealth Edison outlining such agreement is attached hereto as Exhibit A. I advised the employer representatives that although I would continue to attempt to persuade the Will County District Council and Mr. Perinar to moderate their wage demands that the escrow agreement had tied our hands because when the men returned to work and learned of the escrow agreement it would be pretty hard to walk away from the bargaining table with any lesser settlement—that the escrow arrangement established a sort of pattern. I advised the representatives that I felt that Commonwealth Edison had helped Mr. Perinar achieve his objective through the escrow arrangement but that we (the United Brotherhood) would do what we could. I later heard that Commonwealth Edison attempted to rescind the escrow arrangement but was advised by Mr. Perinar that if that was done the Commonwealth Edison project would be shut down."

APPENDIX E

The Affidavit of William Konyha, First General Vice President of the United Brotherhood of Carpenters and Joiners of America during 1979, executed on June 26, 1980, provides in relevant part:

> "6. In the spring of 1979 General President William Sidell told me he had met with respresentatives of the home builders with respect to the wage demands of the Will County District Council. He told me that he considered the wage demands to be excessive and unrealistic and I agreed with him. Mr. Sidell told me he had explained to the employers that we could not direct the Will County District Council to reduce its wage demands but that if nothing was worked out at the bargaining table the employers were to keep us advised and we would do what we could to help bring about a fair settlement. Mr. Sidell told me that if the matter was not resolved in bargaining he wanted me to talk to George Perinar, representative of the Will County District Council, and try to persuade him to moderate his demands and to meet with the contractors to work out a fair settlement. Mr. Sidell said, if necessary, to arrange a meeting to bring the parties together to try to work out a reasonable solution.
>
> "7. I understand that bargaining continued between the Will County District Council and the employers and that a strike ensued starting on or about July 2, 1979, and I then had a number of conversations with George Perinar and Charlie Rinehart of MARBA. My purpose in these conversations was to persuade Mr. Perinar to moderate his wage demands and meet with the employer representatives to work out a fair settlement. It was my understanding from Mr. Rinehart that George Perinar was not interested in meeting and would not alter his wage demands—that he had walked out on MARBA. I told Mr. Rinehart that the United Brotherhood had no authority to stick its nose into the District Council negotiations unless requested by the

District Council, but would do what we could. Mr. Perinar specifically told me that he was not asking for and did not want assistance from the United Brotherhood.

* * *

"12. During the meeting, and also during a period when the employer representatives left the meeting for a private discussion, I repeatedly advised Mr. Perinar that in the best interests of his membership and for the sake of future labor relations in the area, he should moderate his demands. I specifically advised Mr. Perinar that many of the contractors in the area had been union contractors for a long time and there was a good chance that some of them could not continue to operate if the District Council continued to insist upon its full wage demands. When the employer representatives were out of the meeting temporarily, Mr. Danielson made similar arguments to Mr. Perinar. Mr. Perinar at all times insisted that he was representing the wishes of his membership and their best interests and that he would not moderate his demands."

APPENDIX F

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides in pertinent part:

§ 1 Trusts, etc., in restraint of trade illegal . . .

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 provide in pertinent part:

§ 15 Suits by persons injured

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees . . ."

§ 26 Injunctive relief for private parties . . .

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT WILL COUNTY CARPENTERS DISTRICT COUNCIL'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Taking the facts pleaded by Plaintiffs in their complaint as true, do they state a cause of action under the antitrust laws where the factual allegation is that a union has a wage dispute both with an association of contractors and with non-affiliated, independent contractors and strikes and lockouts occur at the expiration of their collective bargaining agreements and where a struck customer of one non-affiliated, independent contractor directs its contractor to settle with the union on the customer's projects so that the work for the customer can be resumed? Were the antitrust laws violated here?

TABLE OF CONTENTS

CITATION TO THE OPINIONS BELOW 1

FEDERAL RULES OF CIVIL PROCEDURE AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 8

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Allen Bradley Co. v. *Local 3, IBEW*, 325 U.S. 797 (1945) 12, 14

Amalgamated Meatcutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 9

Apex Hosiery v. *Leader*, 310 U.S. 469 (1940) 9

Bodine Produce Co., Inc. v. *United Farm Workers*, 494 F. 2nd 541 (C.A. 9, 1974) 12

Connell Construction Co. v. *Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975) 11, 12, 13

Local 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ... 10

NLRB v. *Insurance Agents International Union* 361 U.S. 477 (1960) 10

Pacific Northwest Chapter of the Associated General Contractors, Inc. v. *NLRB*, —— U.S. ——, 110 LRRM 2377 (1982) 13

Snyder Company v. *Associated General Contractors of America, Detroit Chapter, Inc.*, 667 F. 2d 1111 (C.A. 6, 1982) 14

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 9

United States v. *Hutcheson*, 312 U.S. 219 (1941) 9

United Steelworkers of America v. *Bishop*, 598 F. 2d 408 (C.A. 5, 1979) 12

Woelke & Romero Framing v. *NLRB*, —— U.S. ——, 110 LRRM 2377 (1982) 13

Statutes

Clayton Anti-Trust Act, 38 Stat 730, et seq.,
Section 6, 15 U.S.C. § 17 ..... 2, 6
Section 20, 29 U.S.C. § 52 ..... 2, 6

Norris-LaGuardia Act, 47 Stat. 70, et seq.,
Section 4, 29 U.S.C. § 104 ..... 2, 6
Section 5, 29 U.S.C. § 105 ..... 2, 6
Section 13, 29 U.S.C. § 113 ..... 2, 6

Sherman Anti-Trust Act, 26 Stat. 209, et seq., as amended,
Section 1, 15 U.S.C. § 1 2

Rules

Federal Rules of Civil Procedure
Rule 12(b)(6) 2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

v.

WILL COUNTEY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT WILL COUNTY CARPENTERS DISTRICT COUNCIL'S BRIEF IN OPPOSITION

CITATION TO THE OPINIONS BELOW

The unpublished Memorandum Opinion and Order of the District Court is reproduced at pages 27-33 of the Appendix at the back of this brief ("APP. 27-33"). The Court of Appeals for the Seventh Circuit affirmed the District Court's opinion in a decision ("Slip op. pg. ——"), not yet published, which appears at pages 1-26 of the Appendix.

FEDERAL RULE OF CIVIL PROCEDURE AND STATUTES INVOLVED

The District Court dismissed the complaint because it failed to state a claim upon which relief can be granted. FRCP, Rule 12(b)(6). Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52 and Sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. § 104, 105 and 113 are also involved herein and appear in the Appendix at pages 39-43.

STATEMENT OF THE CASE

Respondent Will County Carpenters District Council submits this Brief in Opposition to Petitioners' petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

The factual facets of the decision of the Court of Appeals was drawn from Petitioners' complaint. The decision accepted the allegations in a light most favorable to Petitioners. It provides an excellent statement of the case and, accordingly, for the convenience of the Court, we adopt it herein:

> "The plaintiffs are three trade associations ('the Trade Associations') and two private contractors ('the Contractors') ('Plaintiffs' or 'Petitioners'). The defendants are the Will County Carpenters District Council ('the union'), its international, Commonwealth Edison ('Edison'), and the Gust K. Newberg Construction Company ('Newberg'). *The action stems from*

a labor dispute in Will County during the summer of 1979. (Italics supplied).[A]

"The Trade Associations represented most construction contractors in Will County[B] and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

"At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facility in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

A. At this point it is informative to note that the Norris-LaGuardia Act defines a labor dispute as including "'*any controversy concerning terms or conditions of employment,* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of *whether or not the disputants stand in the proximate relation of employer and employee.*' 29 U.S.C. § 113(c)." (APP 7, fn. 9; Slip op. pg. 7, fn. 9). (Italics provided).

B. The other contractors are independents which represent themselves in negotiations with the union.

"Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement[C] with the union whereby Edison would 'pressure' Newberg, as well as its other contractors, into paying into an escrow account $2.25 per employee for each hour worked during the strike.[1] The contractors were to pay this money into the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed

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C. The actual agreement was entered into with Edison's contractor and was limited to specific Edison projects. The escrow agreements appears at APP. 34.

1. (Court's footnote) "Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement." (APP. 3, fn. 1; Slip op. pg. 2, fn. 1). Interestingly, the Trade Associations and the union both, as a group and independently, met with Edison in an attempt to convince Edison to support their respective positions (Plaintiffs' Appendix to their Brief to the Seventh Circuit, A-11, para. 9).

2. (Court's footnote) "The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor." (APP. 3, fn. 2; Slip op. pg. 3, fn. 2).

to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

"The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations.

"The Plaintiff's Section 1 (of the Sherman Act) claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which interfered

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3. (Court's footnote) "One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (September 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) (Case 13-CB-8611)." (APP. 3, fn. 3; Slip op. pg. 3, fn. 3). The decision, made after a careful and thorough investigation of the charges by the NLRB, found that "the evidence does not show that the Carpenters District Council of Will County and Vicinity failed and refused to bargain in good faith with . . . (Petitioner MARBA or that the union) engag(ed) in take it or leave it bargaining." (APP. 35-37). A MARBA appeal of these findings was denied. (APP. 38).

with the 'rights' of the Trade Associations to engage in collective bargaining.

"Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The district court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the district court found, is exempt from antitrust scrutiny under the 'labor exemption' created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The district court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted." (footnote omitted). (APP. 2-4; Slip op. pgs. 2-4). The plaintiffs appealed this ruling.

After considering the briefs and hearing oral argument, the Seventh Circuit, on April 13, 1982, affirmed the judgment of the district court. The Court of Appeals, first reviewing the standards for the dismissal of a complaint,[4] found that "(a)n examination of the plaintiffs' complaint

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4. *E.g.*, "'The well-pleaded factual allegations of the complaint are taken as true' (citations omitted). A dismissal will be upheld only 'if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.' (citation omitted). The court, however, 'is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts.' (citation omitted). Furthermore, 'conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.' (citations omitted) ('In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted.')" (APP. 4-5; Slip op. pgs. 4-5).

in light of these standards demonstrates that the district court properly dismissed the complaint." (APP. 5; Slip op. pg. 5).[5] More specifically the court found, *inter alia*, that (w)hile the complaint uses the word 'conspiracy' repeatedly, it cannot be read . . . ." " . . . to properly plead such a conspiracy . . . ." so as to make the claim actionable (APP. 10; Slip op. pg. 10). The Court also held that "(b)oth the statutory and nonstatutory labor exemptions (to the federal antitrust statutes) served to immunize the defendants' activities from antitrust liability." (APP. 26; Slip. op. pgs. 24-25). On July 12, 1982, Plaintiffs filed their petition for a writ of certiorari to which this brief is in opposition.

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5. The Court of Appeals "recognized that (the Supreme Court) in *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but (the Seventh Circuit reasoned that) we do not read *Poller* to require that we ignore Rule 12 (b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. '(I)f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.'" (citations omitted) (APP. 5, fn. 5; Slip op. pg. 5, fn. 5).

SUMMARY OF ARGUMENT

Plaintiffs' petition presents no basis for the granting of certiorari. The Seventh Circuit's decision, affirming the District Court's granting of the Rule 12(b)(6) motion, is in harmony with the Clayton Act (15 U.S.C. § 17 and 29 U.S.C. § 52), the Norris-LaGuardia Act (29 U.S.C. §§ 104, 105 and 113) and with other related statutes and the decisions of this Court. The instant case neither presents a question which has been resolved in conflict with a decision by another Court of Appeals nor does it include a novel legal question. Accepting as true the facts alleged in their complaint, Plaintiffs do not state a cause of action under the antitrust laws. All that is involved in this case is a wage dispute following the expiration of collective bargaining agreements. The Union, as well as the Plaintiffs, met with a customer in an effort to influence it and its contractor. Such activity does not violate the antitrust laws, but rather reflects the economic pressure available as part and parcel of the collective bargaining process.

ARGUMENT

Taking the facts pleaded in their complaint as true, Plaintiffs do not state a cause of action under the antitrust laws where the factual allegation is that a union has a wage dispute both with an association of contractors and with non-affiliated, independent contractors and strikes and lockouts occur at the expiration of their collective bargaining agreements and where a struck customer of one non-affiliated, independent contractor directs its contractor to settle with the union on the customer's projects so that the work for the customer can be resumed. No antitrust law was violated here.

This Court has insulated unions from antitrust liability so long as they acted in their own "self-interest."[6] Recognizing the import of the Norris-LaGuardia Act, it has noted that the Sherman Act was aimed only at commercial market restrictions or competition and not at labor activities designed to eliminate competition based on wages. Labor unions inevitably restrain competition among employees over the price of their services, such actions are not the kind of market restraint prohibited by the antitrust laws.[7] And, when a labor organization is not acting alone in some activity within its statutory status as the collective bargaining representative, it is still exempt from the Sherman Act if the disputed activity (e.g., wage settlement) involved only the labor market (*i.e.*, not the product market) and where the disputed activity (*e.g.*, wage settlement) was not imposed upon others, *i.e.*, there was no intentional, predatory, anticompetitive conspiracy.[8] Both the District Court and the Court of Appeals followed and applied the foregoing dictates in holding that — as a matter of law — Plaintiffs' complaint did not allege a violation of antitrust laws.[9]

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6. *United States* v. *Hutcheson*, 312 U.S. 219, 232 (1941).

7. *Apex Hosiery* v. *Leader*, 310 U.S. 469, 501, 503-504 (1940).

8. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) and *Amalgamated Meatcutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

9. As the District Court held "the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market." (APP. 32; Slip op. pg. 5).

Plaintiffs' complaint and petition for certiorari is a spurious one.[10] For many years, the Plaintiff Associations have been the pace setter in the labor market for carpentry work in Will County, Illinois and Vicinity. Now, Plaintiffs have lost, or partially lost some of, their unchallenged predominance within certain employer circles. Newberg, and its customer Edison, have dared through the escrow agreement to act prior and not subsequent to the Plaintiff Associations. The Will County Carpenters employed their legitimate power of jawboning carpentry customers and contractors and, engaging in a selective strike in an attempt to force a settlement on terms most favorable to it. Similarly, the Plaintiff Associations jawboned the International Carpenters, other carpentry customers (including Edison) and contractors and, engaged in a retaliatory, total lockout of all carpenters in an attempt to force a settlement most favorable to them.[11] There was no more interference

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10. As was pointed out in our Answer and Counterclaim (dismissed on other grounds), Plaintiffs only brought this action in an attempt to blackmail the union into accepting a grievance arbitration provision in their collective bargaining agreement. The Will County Carpenters refused to be blackmailed and this suit resulted.

11. This Court has always recognized that "(t)he use of economic pressure by the parties to a labor dispute . . . is part and parcel of collective bargaining." *NLRB* v. *Insurance Agents International Union*, 361 U.S. 477, 495 (1960). And as it stated in *Local 76, International Association of Machinists & Aerospace Workers, AFL-CIO* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147 (1976), "'(R)esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee, *American Ship Building Co.* v. *NLRB*, 380 U.S. (300), at 317." Indeed here, Plaintiffs recognized these rights and used them, albeit unsuccessfully, themselves.

with these collective bargaining negotiations than in any other negotiations. There was no intent or attempt by the Will County Carpenters or by Edison or Newberg to monopolize the product market or to impose a set wage increase throughout Will County, and the complaint makes no such allegations.[12] Each side wanted merely the best deal possible and both Newberg and Edison were valuable pawns directly interested in the dispute. One can, as Petitioners do, argue "subsidies" and an "utter stranger to the union-employer relationship" as invectives meant to "charge up" this case for the reviewer. The simple legal point, however, is that the escrow agreement,[13] terminating the strike against Newberg's Edison projects — thus permitting Newberg to resume work for Edison — evolved from the Union's lawful pressure on Newberg and Edison. Any effects of such an agreement could not serve as the basis for a Sherman Act cause of action.[14]

Petitioners argue that Edison is a stranger to the collective bargaining relationship between Newberg and the Union. This despite the fact that Edison as the customer having a facility built for it is perhaps the most affected by delays in construction. But even apart from that, Norris-LaGuardia dictates that the parties need not stand in the

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12. In the one forum where one of the Trade Associations did contend that the union tried to impose the wage proposal without bargaining, *i.e.*, engaging in take it or leave it bargaining, the NLRB, after a thorough investigation, dismissed the charge and affirmed the dismissal on appeal (APP. 35-38).

13. See APP. 34.

14. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 625 (1975).

proximate relationship of employer and employee. Norris-LaGuardia cannot be ignored.[15] *Bodine Produce Co., Inc.* v. *United Farm Workers,* 494 F. 2d 541 (C.A. 9, 1974) and *United Steelworkers of America* v. *Bishop,* 598 F. 2d 408 (C.A. 5, 1979). An agreement for the wages of a Will County carpenter is quite different than a union's agreement with contractors and manufacturers to permit on the job only electrical equipment manufactured in New York [*Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945)] or where a union signed an agreement with a general contractor to whom it had absolutely no collective bargaining relationship, to subcontract its work to union contractors,

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15. As the Court of Appeals, quoting this Court, stated in the decision below, "(t)he Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy. [The Act defines a labor dispute as "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee (29 U.S.C. § 113(c)]. The right to bargain collectively is specifically protected (29 U.S.C. § 102). Although the Act does not by its terms provide a labor exemption from antitrust laws, 'it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.' *H. A. Artists & Associates* v. *Actors' Equity Association,* 451 U.S. 704, 714 (1981). See L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 723 (1977)." (APP. 7-8, fn. 9; Slip op. pgs. 7-8, fn. 9). And as this Court held in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975), conduct protected from injunction pursuant to the Norris-LaGuardia Act is also exempt "from the operation of the anti-trust laws."

only [*Connell Construction Co.* v. *Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975)]. Likewise, Petitioners' reliance on *Woelke & Romero Framing* v. *NLRB* (also identified by Petitioners as *Pacific Northwest Chapter of the Associated General Contractors, Inc.* v. *NLRB,* —— U.S. ——, 110 LRRM 2377 (1982), is inapposite. These cases deal with hot cargo agreements and not antitrust law.

In the final analysis, all that occurred here occurred within the context of a collective bargaining relationship and labor dispute. As a customer of Newberg, Edison was directly affected, *i.e.,* involved in the labor dispute. The union did not and could not threaten to strike Edison (a violation of the secondary boycott provisions of the National Labor Relations Act) but it could talk to Edison and pressure (*i.e.,* strike) its contractors. The union struck Newberg for a wage settlement and this vitally affected Newberg's customer. Edison wanted its projects completed without interference by a strike and had always paid and would always pay the bill. Newberg, alone or at the insistence of Edison, could have negotiated a final contract with the union. However, as the facts reflect, no final agreement was reached, nor was a minimum or maximum wage increase set. The parties established an escrow account with $2.25 for each hour worked by each carpenter being deposited in the account. Nothing was imposed upon MARBA. Instead, the parties deferred to the union Trade Association's wage settlement which was then being negotiated. If the MARBA settlement turned out to be less than the $2.25, the excess payment by Newberg would have been returned to Newberg. If the MARBA settlement was more, Newberg would have had to pay the additional amounts. There was no conspiracy or illegal act here. All customers, including Edison, have a vital interest in what happens to them. Here, Edison participated in those matters affecting

its interests. This is all that happened here. Within the framework of the existing facts, Defendants did not manifest an intent to suppress competition or to act in a fashion outside the statutory and case law antitrust exemptions.[16]

CONCLUSION

No basis for granting certiorari exists. The petition should be denied.

Respectfully submitted,

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August 9, 1982

16. Dealing in labels only, Petitioners rely upon *Snyder Company* v. *Associated General Contractors of America, Detroit Chapter, Inc.*, 677 F. 2d 1111 (C.A. 6, 1982) to say that the statutory exemption is available only to unions and not to non-union groups. *Snyder* is talking specifically about restraint of trade [*Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945)] and not about a direct restraint on the labor market which is the fact herein. Moreover, *Snyder* also recognized the import of the Norris-LaGuardia Act, an Act which Petitioners herein religiously avoid.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 81-1442

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1832—Frank J. McGarr, *Judge.*

ARGUED OCTOBER 2, 1981—DECIDED APRIL 13, 1982

Before SPRECHER *and* WOOD, *Circuit Judges, and* BROWN, *Senior District Judge.**

SPRECHER, *Circuit Judge.* This case concerns the scope of the labor exemptions to the federal antitrust laws. Here, contractors and their trade associations claimed that an alleged agreement between a union, a contractor, and a public utility violated Section 1 of the Sherman Act, 15 U.S.C. §1. Because we find that the acts alleged fall within both the "statutory" and "nonstatutory" labor exemptions we affirm the district court's dismissal of the complaint.

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*Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

I

The plaintiffs are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The defendants are the Will County Carpenters District Council ("the union"), its international, Commonwealth Edison ("Edison"), and the Gust K. Newberg Construction Company ("Newberg"). The action stems from a labor dispute in Will County during the summer of 1979.

The Trade Associations represented most construction contractors in Will County and had traditionally negotiated a collective bargaining agreement with the union's construction workers which became the standard for all Will County contractors. In 1979, however, the Trade Associations and the union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the union.

At this time, Newberg was engaged in construction for Edison on a nuclear generating station under construction in Braidwood, Illinois, and an existing generating facilty in Romeoville, Illinois. Although Newberg was not a member of any of the Trade Associations, these projects were, nevertheless, subject to the strikes and lockouts.

Edison allegedly moved to prevent work stoppage on the projects by entering into an agreement with the union whereby Edison would "pressure" Newberg, as well as its other contractors, into paying into an escrow account $2.25

per employee for each hour worked during the strike.[1] The contractors were to pay this money into the account for all work done since the expiration of the previous contract, and the funds were to be released in accordance with any collective bargaining agreement negotiated by the union and the Trade Associations.[2] Edison agreed to compensate its contractors for this expense. Newberg employed approximately twenty-five per cent of the Will County union carpenters on its Edison projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979.

The plaintiffs then brought this action in district court.[3] The complaint alleged that the defendants had violated Section 1 of the Sherman Act, tortiously interfered with contractual relations between the Trade Associations and their members, and engaged in a civil conspiracy to interfere with these contractual relations

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1. Edison's other contractors, who were members of one of the Trade Associations, were not named as defendants, although they too are alleged to have participated in the escrow agreement.

2. The amount paid to the escrow account was in addition to the existing wage scale. Thus, if the agreement ultimately reached between the union and the Trade Associations called for a $1.25 per hour wage increase, that amount would be paid out of the escrow fund, with the remainder returned to the contractor.

3. One of the trade associations first filed a complaint with the National Labor Relations Board alleging that the district union had failed to bargain in good faith. This claim was rejected by the Board. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

The plaintiffs' Section 1 claim asserted that by entering into the escrow agreement, the defendants undercut the bargaining position of the Trade Association, thus forcing them to pay a retroactive wage equal in amount to that deposited in the escrow account. This amount, the complaint alleged, was artificially high, since it was subsidized by Edison which, as a public utility, was insulated from competition. Thus, the agreement was a combination, contract or conspiracy which imposed a wage scale that would injure the contractors, and which interfered with the "rights" of the Trade Associations to engage in collective bargaining.

Defendants Edison and Newberg moved to dismiss the complaint, and the district court granted this motion on February 11, 1981. The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act ,29 U.S.C. §§ 104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted.[4] The plaintiffs challenge this ruling on appeal.

II

In reviewing the dismissal of a complaint, "the well-pleaded factual allegations of the complaint are taken as true." *Ashbrook* v. *Hoffman*, 617 F. 2d 474, 475 (7th Cir. 1980). *Accord, Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

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4. The court's opinion did not explain its dismissal of the state claims. However, as the defendants demonstrated in their briefs to the district court, dismissal of the state claims for lack of pendent jurisdiction was appropriate once the Sherman Act claim was dismissed. *UMW* v. *Gibbs*, 383 U.S. 715, 726 (1966). The plaintiffs do not challenge this aspect of the decision on appeal.

A dismissal will be upheld only "it it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." *Ashbrook* v. *Hoffman*, 617 F. 2d 474, 475 (7th Cir. 1980). The court, however, "is not required to accept legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Mitchell* v. *Archibald & Kendall, Inc.*, 573 F. 2d 429, 432 (7th Cir. 1978) (citations omitted). Furthermore, "conclusory alllegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe* v. *LaHue*, 663 F. 2d 713, 723 (7th Cir. 1981). *Accord, Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) ("In testing the legal sufficiency of the complaint . . . conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."). An examination of the plaintiffs' complaint in light of these standards demonstrates that the district court properly dismissed the complaint.[5]

We begin with an examination of the history of the labor exemptions. Because this history has been told in detail elsewhere,[6] our sketch can be brief. Following passage of

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5. We recognize that the Supreme Court in *Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), cautioned against summary dismissal of antitrust claims, but we do not read *Poller* to require that we ignore Rule 12(b)(6) of the Federal Rules of Civil Procedure in the context of antitrust claims. "[I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F. 2d 549, 553 (7th Cir. 1980). *Accord, Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F. 2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

6. *See, e.g.*, Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 662-66 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-38 (1963); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

the Sherman Act in 1890, the courts found labor to be a commodity or article of commerce under the Sherman Act, and applied the Act to invalidate the collective bargaining agreements achieved by labor unions. *See, e.g., Loewe* v. *Lawlor,* 208 U.S. 274 (1908); *United States* v. *Workingmen's Amalgamated Council,* 54 Fed. 994 (C.C.E.D.La.), *aff'd,* 57 Fed. 85 (5th Cir. 1893). In response, Congress sought to specifically exempt labor union activity by enacting sections 6 and 20 of the Clayton Act. 15 U.S.C. § 17 and 29 U.S.C. § 52. Passage of the Clayton Act, however, failed to achieve this end, for the courts continued to apply the Sherman Act to union activities. *See, e.g., Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Association,* 274 U.S. 37 (1927); *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921); *Alco Zander Co.* v. *Amalgamated Clothing Workers,* 35 F. 2d 203 (E.D. Pa. 1929). Congress, therefore, enacted the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.,* which sought to exempt labor activities from the application of various statutes. *See United States* v. *Hutcheson,* 312 U.S. 219, 235-36 (1941). The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity.

In cases decided since the enactment of the Norris-LaGuardia Act, courts have defined the parameters of the labor antitrust exemption. As noted by the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 621-22 (1975), this has resulted in two distinct exemptions to the antitrust laws—a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in busi-

ness markets." *Id.* at 622.[7] We turn, therefore, to an examination of each of these exemptions to demonstrate that either one provided a sufficient basis for the district court's dismissal of the plaintiffs' complaint.[8]

A

The statutory labor exemption stems from the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act. 29 U.S.C. §§ 104, 105, and 113. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 621-22 (1975). Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment" and

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7. Although the statutory and nonstatutory exemptions thus appear to be based on separate and distinct statutes, "'[a]ll the major cases involving labor's antitrust exemption have purported to accommodate the Clayton, Norris-LaGuardia, Wagner, and Sherman Acts.'" *Smitty Baker Coal Co.* v. *UMW,* 620 F. 2d 416, 423 n. 14 (4th Cir.), *cert. denied,* 449 U.S. 870 (1980) (quoting *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 47, 236 n. 13 (1975)).

8. The district court did not analyze the case in terms of statutory and nonstatutory exemptions. However, "[i]t is well settled that on appeal a litigant is entitled to rely on any ground for affirmance, whether or not passed upon by the trial court." *City of Milwaukee* v. *Saxbe,* 546 F. 2d 693, 704 (7th Cir. 1976).

states that these acts cannot be "held to be violations of any law of the United States." 29 U.S.C. § 52.

The Norris-LaGuardia Act further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy.[9] The right to bargain collectively is specifically protected. [10] Although the Act does not by its terms provide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 714 (1981). *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723 (1977).

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9. A labor dispute is defined by the Act as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 20 U.S.C. § 113(c).

10. 20 U.S.C. § 102 provides:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .

The statutory exemption was first interpreted by the Supreme Court in *United States* v. *Hutcheson*, 312 U.S. 219 (1941).[11] There, the Court rejected the claim that a union had violated the Sherman Act by, *inter alia*, inducing other unions to cease working for the employer with which the defendant union had a labor dispute. The Court found that Congress' intent in enacting the Norris-LaGuardia Act was to preclude not only injunctions against specified union activities in labor disputes, but Sherman Act liability for those actvities as well. *Id*, at 234-35. The Court enunciated a broad scope for the labor antitrust exemption:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote amitted).

In *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), the Court applied its *Hutcheson* formulation to find that the statutory exemption had been forfeited because the union defendant had conspired with employers to restrain trade. *Id.* at 809. In *Allen Bradley*, the plaintiffs were manufacturers of electrical equipment, manufacturing outside of New York City. The defendant was the local union representing electrical workers in New York City. The plaintiffs challenged an industry-wide agreement negotiated by the union which provided that contractors would purchase equipment only from New York City electrical manufacturers, and the manufac-

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11. Although the Court in *Apex Hoisery Co.* v. *Leader*, 310 U.S. 469 (1940), examined the Clayton and Norris-LaGuardia Act provisions, the Court's decision in that case appears to have rested upon a determination that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption.

turers would sell to contractors employing union members. Although the union was acting in its own self-interest, there was substantial evidence that it had conspired with non-labor entities. The Court noted that this evidence extended beyond the collective bargaining agreement which, "standing alone, would not have violated the Sherman Act." *Id.*[12] The Court, therefore, found that the union had forfited its stautory exemption.

As *Hutcheson* and *Allen Bradley* demonstrate, the central questions to be asked in determining whether the plaintiffs' complaint in this case alleged conduct not covered by the statutory labor exemption are whether the union acted in its own self-interest and whether a conspiracy between the union and a non-labor entity was properly pleaded. The plaintiffs concede that the agreement they allege between the district union and Newberg was in the union's self-interest. They claim that the agreement served to achieve an "artificially high wage increase," certainly a result that is in the union's interest. Thus, if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*. We find that the plaintiffs failed to properly plead such a conspiracy. While the plaintiffs' complaint uses the word "conspiracy" repeatedly, it cannot fairly be read to remove the alleged conduct from the reach of the statutory exemption.

Essentially, the plaintiffs seek to infer a conspiracy between Edison, Newberg and the union on the basis of the

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12. The Supreme Court made it clear in *Local 24, Int'l Bhd. of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959), that *Allen Bradley* was intended to set only "outside limits" on the normal rule that agreements reached concerning subjects of mandatory bargaining cannot lead to liability for violation of laws. The Court noted that such an approach was necessary to further the congressional policy "as expressed in the Wagner and Taft-Hartley Acts" of the "promotion of collective bargaining." *Id.* at 295.

escrow agreement reached between the contractors and the union. Yet, more than this is needed to plead a conspiracy that would remove the alleged agreement from the coverage of the labor exemption.[13]

Where plaintiffs base claimed conspiracies solely upon the existence of a collective bargaining agreement concerning subjects of mandatory bargaining,[14] courts have generally

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13. While the plaintiffs' complaint could be read to allege the existence of a conspiracy apart from the escrow agreement, such a reading would not be justified. The only factual assertion supporting the plaintiffs' conspiracy claim is the existence of the escrow agreement. The balance of the complaint simply infers a conspiracy from the existence of that agreemnt and alleges that it was entered into pursuant to "a conspiracy." This is insufficient, however. Mere "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." *Briscoe* v. *LaHue*, 663 F. 2d 713, 723 (7th Cir. 1981). *See Larry R. George Sales Co.* v. *Coal Attic Corp.*, 587 F. 2d 266, 273 (5th Cir. 1979) ("A general allegation of conspiracy . . . without a statement of the facts constituting the conspiracy, is a mere allegation of a legal conclusion and is inadequate of itself to state a cause of action. The pleader must allege the facts constituting the conspiracy, its object and accomplishment.").

14. Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable. The agreement allegedly reached was quite similar to a traditional collective bargaining agreement: it was between an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining—wages. The fact that the final wage was not final, but rather was dependent on an external factor—the size of the wage increase granted by the Trade Associations—does not deprive it of that character. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom . . . to negotiate the terms and conditions of . . . employment," 29 U.S.C. § 102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. § 151.

held that these allegations are insufficient to remove the statutory exemption from union conduct.[15] "The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining." *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 558 (9th Cir. 1974).

In *UMW* v. *Pennington*, 381 U.S. 657 (1965), small mine operators brought an antitrust action against the coal

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15. Where collective bargaining agreements pertain to subjects which are not mandatory subjects of collective bargaining, some courts have held that the agreements can serve as evidence of a conspiracy. Under § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." Thus, Justice White's opinion in *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), found that where a union and an employer agree on mandatory subjects of bargaining an exemption applies, but the exemption is lost when agreement is reached on such topics as prices, which are not proper subjects of collective bargaining. *Sit American Fed'n of Musicians* v. *Carroll*, 391 U.S. 99, 108 (1968); L. SULLIVAN HANDBOOK OF THE LAW OF ANTITRUST 727-28 (1977).

Here, the collective bargaining agreement concerned itself with wages—explicitly identified as a proper subject of collective bargaining. Thus, the statutory exemption applies. *See Bodine Produce, Inc.* v. *United Farm Workers Organizing Comm.*, 494 F. 2d 541, 551 (9th Cir. 1974) ("Union-imposed restraints which serve purposes closely related to wage, hours, and conditions of employment generally are considered free of *Allen Bradley* taint."). The logic behind this position is clear. "'[C]ollective-bargaining agreements over labor standards inevitably have anticompetitive consequences; to infer from these agreements the necessary elements of a conspiracy to restain trade under the antitrust laws makes no accommodation for the fact that the national labor policy is based upon the conclusion of these agreements.'" *Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 423 n. 10 (4th Cir.), *cert denied*, 449 U.S. 870 (1980) (quoting Comment, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 704 (1968)). *See also* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1203 (1980).

miners' union. The basis of the complaint was that large employers and the union had entered into an industry-wide collective bargaining agreement that imposed a wage scale that small operators would be unable to pay. The plaintiffs claimed that this had been done for the purpose of driving them out of business.

The Court began its analysis by noting, in keeping with *United States* v. *Hutcheson*, 312 U.S. 219 (1941), that it is "beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." 381 U.S. at 664. The union loses the antitrust labor exception, however, "when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665. The Court qualified this statement by noting that

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.*

Id. at 665 n. 2 (emphasis added). Thus, the union did not lose its exemption simply by entering into a series of collective bargaining agreements. The agreements alone could not

deprive the union of the labor antitrust exemption, absent further evidence of a conspiracy.[16] *Accord, California Dump Truck Owners Association* v. *Associated General Contractors*, 562 F. 2d 607, 611 (9th Cir. 1977) ("An antitrust action based upon the [collective bargaining agreement] alone does not state a claim upon which relief can be granted."). The Court, however, found that the plaintiffs had presented proof of an agreement by the union to seek the same wages from all employers, and thus there was an adequate allegation that the statutory exemption had been forfeited. *Id.* at 669.[17] Here, however, all the assertions of conspiracy are based upon the escrow agreement between the defendants.

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16. One commentator has distinguished Justice White's opinion in *Pennington* from his opinion in its companion case, *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), on this basis. "In *Pennington* the union had openly conspired with a group of employers," while "[i]n *Jewel Tea*, on the other hand, the collective bargaining agreement itself constituted the labor-non-labor combiantion." Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 COLUM. L. REV. 742, 755 (1966).

17. The Court also found that the nonstatutory exemption did not apply. *See* text accompanying notes 25-27, *infra*.

There is no allegation in the plaintiffs' complaint that the union adopted a "take it or leave it" stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found that this was not the case. *See* note 3, *supra*. Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws.

Furthermore, even if the union had adopted such a position, the plaintiffs would have to allege that this position stemmed from a *shared purpose* with a non-labor group, and was not maintained by a union "as a matter of its own policy.'" *Ramsey* v. *UMW*, 401 U.S. 302, 312-13 (1971) (quoting *UMW* v. *Pennington*, 381 U.S. 657, 664 (1965)).

Thus, the statutory labor antitrust exemption applies, and dismissal of the complaint was proper.[18]

The above method of analysis is not uniformly followed, however. Some courts, including the court below, have viewed *Pennington* as a distinct model of analysis imposing a strict series of requirements for finding a collective bargaining agreement to form the basis of an antitrust violation. *See Smitty Baker Coal Co.* v. *UMW* 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Embry-Riddle Aeronautical University* v. *Ross Aviation, Inc.*, 504 F. 2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 560-61 (9th Cir. 1974); *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F. 2d 546, 553-54 (7th Cir. 1970).[19] These

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18. Further support for this proposition is provided by the Supreme Court's opinion in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, the Court found that a union representing workers in the building trades violated the antitrust laws by exacting an agreement from a contractor not to subcontract work to firms lacking a collective bargaining agreement with the union. The Court noted that the union had no interest in representing the contractor's employees. Therefore, it noted that "[t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement." *Id.* at 625-26. This suggests that an agreement would not be sufficient to evince a conspiracy where it was only contained in a collective bargaining agreement. *See Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 424 n. 19 (4th Cir.), *cert denied*, 449 U.S. 870 (1980); *Larry V. Muko, Inc.* v. *Southwestern Pa. Bldg. & Constr. Trades Council*, 609 F. 2d 1368, 1373 (3d Cir. 1979); *Commerce Tankers* v. *National Maritime Union*, 553 F. 2d 793, 801 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

19. Indeed, *Pennington* is sometimes viewed as a case in which the Supreme Court permitted an allegation of conspiracy to be based *solely* on an agreement concerning a subject of mandatory bargaining. *See e.g.*, St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 621 (1976).

requirements were accurately summarized by the district court below:

> Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose.

Mid-America Regional Bargaining Association v. *Will County Carpenters District Council*, No. 80 C 1832, slip op. at 4 (N.D. Ill. Feb. 11, 1981). *See also Smitty Baker Coal Co.* v. *UMW*, 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980).

The district court noted, and we agree, that under this analysis the plaintiffs failed to allege that the non-labor entities (Newberg and Edison) would *directly* benefit from the restraint. Tying its analysis to the Supreme Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the district court correctly found that the primary effect of the agreement was on wage scales, and thus any benefit to non-labor entities would be indirect. *Mid-America Regional Bargaining Association* v. *Will County Carpenters District Council, supra* at 5.[20] Since ony antitrust competitive effect resulted "from the elimina-

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20. This approach tends to result in combining what the Supreme Court in *Conell* noted were two separate analyses. The court below thus seemed to base its decision on a combination of statutory and nonstatutory exemption grounds. While the court looked to specific statutes, its analysis of impact on the labor and business markets is identified in *Connell* as analysis appropriate to determining whether there is a basis for a nonstatutory exemption.

tion of wage competition," the labor exemption covered the alleged agreement. *Id.* at 5-6.

Although the district court did not find it necessary to look beyond the question of direct impact on the business market, we note that the plaintiffs' complaint also fails to properly plead a *concerted anti-competitive purpose.* This requires a shared purpose between the union and non-labor entities to restrict competition. The complaint here, however, alleges three *different* purposes for the agreement reached among the parties. The union allegedly entered the agreement to weaken the resistance of contractors to its wage demands (¶41(d)). Edison allegedly agreed to subsidize the agreement in order to maintain production on its generating stations (¶40(d)). Finally, Newberg allegedly entered into the agreement in order to force a ruinous wage increase and thereby gain an unlawful competitive advantage (¶41(e)).

These pleadings fail on two levels to demonstrate a concerted anti-competitive purpose. First, it is clear that each party had a separate and distinct purpose—there simply was no single shared purpose.[21] Second, the only *anti-com-*

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21. The complaint alleges that each party *knew* the likely results of its actions and, therefore, intended them. This is not enough, absent an allegation of *purpose,* to plead a cause of action under *Pennington.* As the court in *Embry-Riddle Aeronautical Univ.* v. *Ross Aviation, Inc.,* 504 F. 2d 896, 903 (5th Cir. 1974), noted:

> A rule of law requirig a lower level of intent than purpose would open the way to disastrous incursions upon Congressionally-sanctified areas of labor union activity. When a union imposes a collective bargaining agreement upon Company X, it will always advantage X by forcing the same agreement on competitor Company Y which theretofore offered less advantageous terms and working conditions. This is a fact of commercial life known to all unions. But if possession of that knowledge should mean that the union had to tread warily in negotiating with Y, refraining from striking, for example, or from taking a rigid bargaining stance for fear of losing the antitrust exemption, labor policy would be stood on its head.

petitive purpose alleged was possessed by Newberg. Yet the complaint fails to plead even this interest properly, for it alleges that Edison agreed to "pressure" its contractors into signing the escrow agreement with the union (¶40). Thus, the complaint alleges that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. This pleading is clearly inadequate to fall within the *Pennington* model. *See Cedar Crest Hats, Inc.* v. *United Hatters, Cap & Millinery Workers*, 362 F. 2d 322, 326 (5th Cir. 1966).

The plaintiffs' complaint, therefore, failed to properly allege a conspiracy between the defendants in this case that would remove the complained of acts from the scope of the statutory labor exemption.[22] The district court properly dismissed the complaint.

B

Even were we to find that the complaint contained adequate allegations of conspiracy to remove this case from the statutory labor exemption, this would not be dispositive. Where a complaint properly alleges a conspiracy between a

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22. Although both the statutory and the nonstatutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemptions would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment. "To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption." *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F. 2d 840, 847 n. 14 (3d Cir. 1974). *See also Amalgamated Meat Cutters & Butchers Local 576* v. *Wetterau Foods, Inc.*, 597 F. 2d 122, 136 (8th Cir. 1979); *Mackey* v. *NFL*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

union and non-labor entities, a non-statutory antitrust exemption may still apply. This is true of this case.

The foundations of the nonstatutory exemption are not as easily identifiable as those of the statutory exemption. The origins of the exemption, however, are generally traced to Chief Justice Stone's opinion in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). *See e.g., Consolidated Express, Inc.* v. *New York Shipping Association, Inc.*, 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980).[23] In *Apex Hosiery*, the Court found that a violent strike, which inevitably interfered with the flow of the employer's goods in interstate commerce, was not actionable under the Sherman Act. Although the Court examined the statutes underlying the statutory exemption, it did not base its decision upon the statutory exemption. Instead, it held that because the plaintiffs had failed to show that the union's actions had been intended to operate, and had operated, as substantial restraints on *commercial competition*, no claim was stated under the Sherman Act. The Court contrasted restraints on commercial competition with restraints on the market for labor. "It would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or restraints in restraint of trade or commerce under the Sherman Act." *Id.* at 503. While *Apex Hosiery* appeared to rest on the ground that substantive liability under the Sherman Act did not attach to the union activities complained of, later courts

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23. Others place the genesis of the non statutory exception much later, with the Supreme Court's decision in *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). *See, e.g., California Dump Truck Owners Ass'n* v. *Associated Gen. Contractors*, 562 F. 2d 607, 611 (9th Cir. 1977).

and commentators have viewed the case as establishing a nonstatutory exemption from Sherman Act coverage for restraints acting primarily upon the labor market. *See, e.g., Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 901 (1980); Leslie, *Principles of Labor Antitrust,* 66 VA. L. REV. 1183, 1196-97 (1980).[24]

This exemption was more explicitly developed by Justice White's opinion in *UMW* v. *Pennington,* 381 U.S. 657 (1965), and *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965).[25] In *Pennington,* after finding the statutory exemption inapplicable to an alleged conspiracy between mine operators and the union to impose a ruinous wage scale on small mine operators,[26] Justice White's opinion for the Court enunciated what is now known as the "nonstatutory exemption." *See Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622

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24. There is some question whether *Apex Hosiery* represents a finding of a lack of substantive liability as opposed to a finding that the conduct was exempted. Thus, one author states in one part of an article that "the actual holding" of *Apex Hosiery* "was that a union did not violate the Sherman Act by engaging in a violent primary sit-down strike," and in another that "the nonstatutory exemption apparently originated" in *Apex Hosiery.* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law,* 62 VA. L. REV. 603, 606, 618 n. 64 (1976). While Justice Douglas decried the tendency to confuse the questions of liability and exemption, *Ramsey* v. *UMW,* 401 U.S. 302, 314 (1971) (Douglas, J., dissenting), much of the analysis of *Apex Hosiery* has been adopted in examining the nonstatutory exemption. *See e.g., UMW* v. *Pennington,* 381 U.S. 567, 666 (1965).

25. While Justice White did not write for a majority of the Court in *Pennington* or *Jewel Tea,* the Court has since looked to his opinions as authoritative expositions of the nonstatutory exemption. *See Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 622 (1975).

26. *See* text accompanying notes 15-17, *supra.*

(1975). Justice White looked to "national labor policy" as expressed in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, to determine whether anything in the Act conflicted with his conclusion that the union's agreement was a proper subject of antitrust scrutiny. 381 U.S. at 666. He found that national labor policy was, in fact, violated by an agreement which "strait-jacketed" the union into an agreement to seek higher wages than an employer could afford. *Id.* The Court compared this agreement with other illegal agreements where "the restraint on the product market is direct and immediate." *Id.* at 663. The effect of this agreement was to limit the unions freedom to act in its self-interest while furthering the employers' goal of elimination of competition. *Id. at* 666-67. Such an agreement was contrary to national labor policy and thus not entitled to any exemption from antitrust liability. *See* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1207 (1980). The Court emphasized that industry-wide collective bargaining, on the other hand, was permissible because "the effect on the product market, though clearly present, results from the elimination of competition based on wages among employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664.

In *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*, the Court held that a union did not violate the antitrust laws by seeking and obtaining a collective bargaining agreement with retail stores which prohibited the sale of meat between six at night and nine in the morning. Justice White's opinion[27] suggested that, although there was no allegation

27. Justice White's opinion received the votes of only two other Justices. There was no opinion of the Court.

of conspiracy in the case, this did not automatically bestow an antitrust exemption upon the challenged agreement. *Id.* at 688-89.

Although this position seems to conflict with earlier statutory exemption cases, it can be reconciled with them when the nature of the agreement is considered. Justice White noted that "[e]mployers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689.[28] An agreement on such subjects, presumably, would receive the statutory exemption. Some agreements on nonmandatory subjects, such as price scales, however, could violate the antitrust laws. Since the agreement at issue in *Jewel Tea* fit neither category directly, it became necessary to examine whether an exemption based on policy rather than statutory language would apply:

> [T]he issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*

Id. at 689-90 (emphasis added) (footnote omitted). In a footnote, the opinion made it clear that the "crucial determinant" was whether the agreement had a direct impact on labor interests or "the labor market." *Id.* at 690 n. 5. Thus, *Jewel Tea,* in conjunction with *Pennington,* suggests the existence of a labor exemption to the antitrust laws whose

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28. 29 U.S.C. § 158(a)(5) imposes a duty upon employers to engage in collective bargaining with employees.

boundaries were determined by attempting an accommodation between national labor policy and antitrust laws, which was reached in turn by an examination of the impact of a given agreement on the labor and product markets.[29]

This interpretation was confirmed by the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). There, a general contractor sought to invalidate an agreement between the contractor and the union whereby the contractor agreed to deal with mechanical subcontractors only if they were parties to the union's multiemployer collective bargaining agreement. The Court began its analysis by noting that the statutory exemption does not exempt "concerted action or agreements between unions and nonlabor parties." *Id.* at 622. Nevertheless, the Court noted that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in the business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.*

The Court hinged its determination on whether the agreement between the union and the employer was a "direct restraint on the business market," as opposed to an in-

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29. A more general statement is that "the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Mackey* v. *NFL*, 543 F. 2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (citations omitted). The *Connell* labor-business market distinction appears to serve as a generally applicable standard for making this determination. *Id.* at 614. Where an agreement primarily affects the labor market, the policy favoring collective bargaining is preeminent, but when an agreement has a direct impact on the business market, the antitrust laws are of greater concern.

direct restraint that would "follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625. Because the union in *Connell* imposed "direct restraints on the business market" by limiting which subcontractors could receive the business of the contractor, the Court found that no exemption applied. *Id.* at 623. *Connell* is thus consistent with the *Apex Hosiery* mode of analysis—finding a nonstatutory exemption for restraints on the labor market which might indirectly affect the business market, but denying the exemption for direct restraints on the business market.[30]

This is the interpretation of the nonstatutory exemption adopted by the court in *Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F. 2d 494 (3d Cir. 1979), *vacated on other grounds,* 448 U.S. 901 (1980). There the court explained that "[t]he term nonstatutory exemption, commonly used in discussing the interface between the often conflicting national antitrust and labor policies, is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." *Id.* at 513. Thus, "the rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act." *Id.* at 514. The *Consolidated Express* court recognized, therefore, that the central examination in *Connell* was whether there was a direct restraint on business. *Id.* at 517. *See also Commerce Tankers Corp.* v. *National Maritime Union,* 553 F. 2d 793, 801 (2d Cir.), *cert. denied,* 434 U.S. 923 (1977).

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30. The *Connell* opinion's use of the term "business market" instead of "product market" was not, apparently, indicative of a change in the Court's approach. 421 U.S. at 622.

Thus, a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. Restraints operating primarily upon the business market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the plaintiffs' complaint in light of the nonstatutory exemption demonstrates that the district court properly dismissed the plaintiffs' complaint. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

It is difficult to imagine a case in which the alleged agreement concerned wages more directly than the complaint here.[31] The crux of the complaint is an allegation that Newberg agreed to pay as much as a $2.25 per hour wage increase, depending on what other contractors did. The plaintiffs allege that the union knew that the effect of this agreement would be to cause other employers to offer a retroactive wage increase equal to the maximum contemplated by the union's agreement with Newberg. The restraint thus alleged is not a "direct restraint on the business market" but rather a direct restraint on the labor market, with only tangential effects on the business market. Any possible

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31. The Supreme Court has taken a broad view of what constitutes an agreement with a direct impact on the labor market. Thus, in *Local 24, Int'l Bhd. of Teamsters* v. *Oliver*, 358 U.S. 283 (1959), the Supreme Court examined a state antitrust challenge to a collective bargaining agreement. The agreement provided for a minimum wage scale for truck drivers and, to prevent evasion, included a provision that drivers who owned and operated their own vehicles would be paid a prescribed rental for their vehicles in addition to the required wage. The Supreme Court found that the state antitrust laws could not be applied. The Court found that the agreement was one directly affecting wages, and not " 'a remote and indirect approach to the subject of wages.' " *Id.* at 293.

harm to the plaintiffs would "follow naturally from the elimination of competition over wages and working conditions." *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 625 (1975). Thus, the nonstatutory exemption would apply in this case

III

We conclude that the district court correctly dismissed the plaintiffs' complaint. Both the statutory and non-statutory labor exemptions served to immunize the defendants' activities from antitrust liability. The order of the dstrict court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION COMPANY, a Delaware corporation, and U.S. HOME CORPORATION, a Delaware corporation,

Plaintiffs,

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, an Illinois corporation, and GUST K. NEWBERG CONSTRUCTION CO., an Illinois corporation,

Defendants.

No. 80 C 1832

MEMORANDUM OPINION AND ORDER

Plaintiffs, Mid-America Regional Bargaining Association ("MARBA"), the Contractors Association of Will and Grundy Counties ("CAWGC"), the Residential Construc-

tion Employers Council ("RCEC"), the Joliet Construction Company and U.S. Home Corporation have brought a three-count complaint charging defendants Will County Carpenters District Council ("Will County"), United Brotherhood of Carpenters and Joiners of America (AFL-CIO) ("District Carpenters"), Commonwealth Edison Company ("Edison"), and Gust K. Newberg Construction Company ("Newberg") with unlawful combination and conspiracy in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1, interference with contractual relationships and civil conspiracy.

The specific allegations stem from the following: Plaintiffs MARBA, CAWGC and RCEC are not-for-profit corporations engaged in the business of representing commercial and residential contractors in collective bargaining agreements. Joliet and U.S. Home are contractors, members of the plaintiff associations, who have delegated the responsibility for negotiating collective bargaining agreements with their employees to the plaintiff associations

According to the complaint, the collective bargaining agreements which had been in effect between the plaintiff associations and the District Carpenters expired on June 1, 1979. In early July, construction work in Will County, with the exception of work on Edison projects at Braidwood and Romeoville, was halted by work stoppages. During these work stoppages, the plaintiff associations and District Carpenters continued their collective bargaining.

The complaint then alleges that in July, 1979, the defendants entered into an escrow agreement, outside the collective bargining process, which imposed artificially high construction costs on every Will County contractor employing union carpenters. Under the terms of the alleged agreement, Newberg, an employer of a substantial number of

Will County union carpenters because of Newbergs contract to work at the two Edison plants, would put $2.25 per hour for each hour union carpenters worked on or after June 1, 1979, into an escrow account. Edison, a "stranger" to the union-employer relationship, allegedly instigated this arrangement and subsidized Newberg's payments. Moreover, plaintiffs contend that the escrow agreement applied to approximately twenty-five percent of the relevant market. Its effect, they assert, was to directly and irrevocably raise the minimum level of carpentry costs by twenty percent and to undermine the collective bargaining process in Will County.

This cause is presently before the court on the motions of several defendants to dismiss.[1] However, this court will limit its discussion to the issues raised in Edison's brief. We do so because the issues raised therein are dispositive of the case.

Edison bases its motion to dismiss on several theories. Chief among them is the assertion that plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed. R. Civ. P., in that sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 20 U.S.C. §52, and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, and 113, which constitute the labor exemption to the antitrust laws, serve to exempt the defendants from the instant cause. The purpose of the labor exemption is to "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the

1. In addition to Edison's motion, District Carpenters filed a motion to dismiss or, in the alternative, for summary judgment. Newberg filed a motion to dismiss with accompanying "suggestions" in support of its motion, but it also adopted Edison's memoranda in support of the latter's motion to dismiss.

operation of the antitrust laws." *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975).

Edison maintains that the instant cause fits within the labor exemption because the only direct restraint alleged in the complaint is that of a restraint in the market for human labor—which is specifically exempted by section 6 of the Clayton Act. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). Edison contends further that the complaint contains no allegations that the alleged activities of the defendants resulted in a direct restraint of the business market, the effect of which would be to deprive defendants of the protection afforded by the labor exemption.

In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), the Supreme Court articulated guidelines for determining when an agreement between a union and a non-labor group to restrain the market for human labor is no longer exempted from antitrust litigation. *See also Smitty Baker Coal Co.* v. *United Mine Workers of America*, 620 F. 2d 416 (4th Cir. 1980). Under *Pennington*, the plaintiff must allege five elements: 1) that the union must have agreed to impose upon other employers terms agreed to by it and a "non-labor" entity; 2) that the union activity must not be unilateral; 3) that the union activity must be at the behest of or 4) in combination with, a non-labor entity which occupies such a position in the competitive structure that it would *directly benefit* from the restraint; and 5) that the union and non-labor groups share an anti-competitive concerted purpose. *Id.* at 665-69.

Plaintiffs admit that they have modeled their complaint after *Pennington* "in certain respects." Plaintiffs' Memorandum in Opposition to Motions to Dismiss at 27. However, that complaint is noticably deficient in one respect.

The plaintiffs fail to establish that the activities of Will County and District Carpenters were at the behest of, or in combination with, Edison and Newberg (entities which occupy positions in the competitve structure) so that the later defendants directly benefit from the restraint. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

Connell Construction Co. v. *Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975) serves to shed more light on the complicated interface between the areas of antitrust and labor law. There, the defendant union forced the plaintiff general contractor to enter into an agreement the effect of which was to impose a *direct restraint* on competition among subcontractors who employed union members. The Court held that the union, by agreement with several contractors, had rendered non-union subcontractors ineligible to compete for a portion of available work. *Id.* at 625. "This kind of direct restraint on the business market has substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.*

A restraint of this sort is not alleged here. The facts in the instant complaint allege only a direct restraint on the labor market. Edison concedes that a wage agreement may have an anti-competitive effect. However, that effect stems from the elimination of wage competition and is consequently protected from antitrust litigation by the labor exemption.

Included in our consideration is the recent decision of the Circuit Court of Appeals for the Ninth Circuit, *California State Council of Carpenters* v. *Associated General Contractors of California*, No. 77-2323 (9th Cir. Nov. 20, 1980) that plaintiffs offer in opposition to defendants' motions. In *California Council*, the unions argued that the de-

fendants, members of a construction industry employers organization, conspired to coerce property owners, general contractors and others to hire only contractors and subcontractors who had not signed agreements with the unions. Unlike the case at bar, there, the plaintiffs contended that the employers conspired to impose a *direct* restraint on the business market. The Ninth Circuit refused to apply the statutory labor exemption. *Id. California Council* is inapposite here because it involves a direct restraint on the business, not labor, market.

In conclusion, the court finds that the safe harbor provisions of the Clayton and Norris-LaGuardia Acts prohibit pleading a cause of action that is premised on an anticompetitive conspiracy involving unions when the restraint allegedly imposed by that conspiracy is not a direct restraint on the business market. As the direct restraint imposed here is not a direct restraint on the business market, but a direct restraint on the labor market, plaintiffs can plead no cause of action upon which relief can be granted. Accordingly, the motions of the various defendants to dismiss are granted; the case is dismissed.

ENTER:

/s/ Frank McGarr
UNITED STATES DISTRICT JUDGE

DATED: February 11, 1981

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, et al.

v.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, et al.

Civil Action File No. 80 C 1832

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the case is dismissed.
Dated at Chicago, Illinois, this 11th day of February, 1981.

ESCROW AGREEMENT

The undersigned employer agrees with the undersigned union to be bound by the verbal agreement reached on July 26, 1979 to establish an escrow account to be jointly administered by the undersigned employer and union. For each hour worked by members of the undersigned union for the undersigned employer on the Commonwealth Edison Company Braidwood and/or Will County Power Plants since June 1, 1979, an amount of $2.25 shall be placed in this joint escrow account by the undersigned contractor.

Upon completion of wage negotiations between the Mid-America Regional Bargaining Association (MARBA) and the undersigned union all monies contributed by the undersigned contractor to the escrow account will be returned to the undersigned contractor who will prepare a retroactive payroll reflecting the negotiated wage increase and all tax deductions (incl. FICA). The contractor will then issue net checks to all employees involved.

Weekly, an amount of $2.25 per hour for each hour worked by members of the undersigned union for the undersigned contractor at the Commonwealth Edison Will County and/or Braidwood Power Plants shall be transmitted to the jointly administered account and held until a wage settlement is agreed to between MARBA and the undersigned union.

WILL COUNTY CARPENTER COUNCIL
By: /s/ Gary G. Perinar
Dated: 8-17-79.

By: /s/ R. Bruce Kysler
Dated: August 9, 1979
Phillips, Getschow Co.
(Contractor)

NATIONAL LABOR RELATIONS BOARD
REGION 13

September 6, 1979

Charles E. Murphy, Esq.
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603

Re: Carpenters District Council of Will
County and Vicinity
(Mid-America Regional Bargaining Association)
Case 13-CB-8611

Dear Mr. Murphy:

The above-captioned case charging a violation under Setion 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

From the investigation, the evidence does not show that the Carpenters District Council of Will County and Vicinity failed and refused to bargain in good faith with the Mid-America Regional Bargaining Association by the following acts and conduct: (1) unreasonably delaying the commencement of negotiation, failing and refusing to meet at reasonable times and places to negotiate a new agreement; engaging in take-it or leave-it bargaining; instituting and maintaining a strike against members of the Association prior to any impasse in negotiations being reached; inducing, encouraging and coercing members of the Association to withdraw from the Association and sign individual agreements wth the Union; refusing to permit representatives of the FCMS or the International Union to attend or assist

in the negotiations; and unlawfully insisting to impasse and engaging in a strike over certain non-mandatory subjects of bargaining. The evidence does show that the Carpenters Council of Will County and Vicinity failed and refused to bargain, upon request, about the subject of grievance arbitration; this aspect of the charge remains outstanding.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on September 19, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Alex V. Barbour
Regional Director

Enclosure
Certified Mail
(Return Receipt Requested)

cc: Carpenters District Coucil of
Will County and Vicinity
2112 West Jefferson Street, Suite 259-261
Joliet, Illinois 60435
Attn: George Perinar, Pres. & Bus. Rep.

Bernard M. Mamet & Associates, Ltd.
327 S. LaSalle Street, Suite 1326
Chicago, Illinois 60604

Mid-America Regional Bargaining Association
228 North LaSalle Street
Chicago, Illinois 60601

General Counsel, Office of Appeals
NLRB
Washington, D.C. 20570

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

October 19, 1979

Re: Carpenters District Council of Will County
and Vicinity
(Mid-American Regional Bargaining Association)
Case No. 13-CB-8611

Charles E. Murphy, Esquire
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Murphy:

Your appeal from the Regional Director's partial refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of September 6, 1979.

Very truly yours,
John S. Irving
General Counsel

By /s/ Ronald M. Slatkin
Acting Director
Office of Appeals

cc: Director, Region 13
Carpenters District Council of Will County & Vicinity, 2112 West Jefferson Street, Suite 259-61, Joliet, Illinois 60435
Attn: George Perinar, President & Bus. Rep.
Bernard M. Mamet & Associates, Ltd., 327 S LaSalle Street, Suite 1326, Chicago, Illinois 60604
Mid-American Regional Bargaining Association, 228 North LaSalle Street, Chicago, Illinois 60601

APPENDIX

Section 1, Sherman Anti-Trust Act, 26 Stat. 209, as amended,, 15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities for the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty

thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 6, Clayton Anti-Trust Act, 38 Stat. 731, 15 U.S.C. § 17

"§ 17. Antitrust laws not applicable to labor organizations

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, Clayton Anti-Trust Act, 38 Stat. 738, 29 U.S.C. § 52

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Section 4, Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104

"§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the Unted States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 5, Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 105

"§ 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

"No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the per-

sons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title."

Sections 13 (b) and (c), Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 (b) and (c)

"§ 113. Definitions of terms and words used in chapter

"When used in this chapter, and for the purposes of this chapter —

. . .

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. . . ."

Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO)'S BRIEF IN OPPOSITION

HUGH J. MC CARTHY, JR.
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111 West Washington Street, Suite 841
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COUNSEL FOR UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO), Respondent

August 11, 1982

QUESTION PRESENTED

Whether a complaint filed pursuant to Section 1 of the Sherman Act was properly dismissed when it alleged that in the course of a labor dispute an agreement was negotiated concerning wages between the union, a contractor and the contractor's customer, in which the union agreed that its member employees would cease picketing, and return to the contractor's customer's jobsite and the contractor's customer agreed to pay monies into an escrow account pending the outcome of collective bargaining when the courts below found that the complaint alleged no conspiracy apart from that agreement.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
1. Jurisdiction in the Court of First Instance	2
2. The Facts	2
3. The Decision of the District Court	4
4. The Decision of the Court of Appeals	5
REASONS FOR DENYING THE WRIT	6
1. The Decision Below Does Not Conflict with Decision of This Court and Numerous Courts of Appeals and does not impermissibly expand the scope of the labor exemptions to antitrust laws	6
2. The Court of Appeals decision properly required the Petitioner to allege a shared purpose between the Union and non-labor entities to restrict competition	11
CONCLUSION	12
APPENDIX A	A-1
APPENDIX B	
APPENDIX C	
APPENDIX D	

TABLE OF AUTHORITIES

	PAGE
Cases	
Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, reh. denied, 326 U.S. 802 (1945)	6, 7
Amalgamated Meat Cutters and Butchers Local 576 v. Wetterau Foods, Inc. 574 F.2d 133 (8th Cir. 1974)	7
Bodine Produce, Inc. v. United Farm Workers, 494 F.2d 531 (9th Cir. 1974)	11
California State Council of Carpenters v. Associated General Contractors of California, Inc., 648 F.2d 527 (9th Cir. 1981), cert. granted, U.S. 102 S.Ct. 998 (1982)	8, 12
Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 (1975), reh. denied, 423 U.S. 884 (1975)	6, 8
Embry-Riddle Aeronautical University v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974)	11
H. A. Artists and Associates, Inc. v. Actors Equity Association 451 U.S. 704 (1981)	12
Mackey v. National Football League, 543 F. 2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977)	7, 8
McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979)	7
Scooper Dooper, Inc. v. Kraftco Corp. 494 F.2d 840 (3rd Cir. 1974)	7
Smitty Baker Coal Co., Inc. v. U.M.W., 620 F.2d 416 (4th Cir. 1980)	12
Snyder Company v. ASC, 677 F.2d 1111 (6th Cir. 1982)	6
U.M.W v. Pennington, 381 U.S. 657 (1965)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-69

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

Defendant, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO), respectfully prays that this Court deny a writ of certiorari seeking review of the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, 675 F.2d 881, appears in Appendix A of the Petition. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported and appears in Appendix B of the Petition.

JURISDICTION

The United Brotherhood of Carpenters and Joiners of America, (AFL-CIO) adopts the statement of jurisdiction of the Petition.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U.S.C., §1 et seq.), and the Clayton Act (15 U.S.C. §12 et seq.) are set forth in the Petitioners' Appendix D and Supplemental Appendix A, hereto.

STATEMENT OF FACTS

1.

Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

2.

The Facts

The Respondent, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, (AFL-CIO), believe that the Statement of the Case as presented in the Petition is incomplete and, as a result may be misleading. For that reason the following brief additional statement is submitted.

The Petitioners are three trade associations ("the Trade Associations") and two private contractors ("the Contractors"). The Defendants are the Will County Carpenters District Council (the "Union"), Commonwealth Edison ("Edison"), the Gust K. Newberg Construction Company ("Newberg") and the United Brotherhood of Carpenters and Joiners of America, (AFL-CIO). The action stems from a labor dispute in Will County during the summer of 1979. (App. C, pp. 34a - 36a).

The Trade Associations represented some of the construction contractors in Will County and had in the past negotiated a series of collective bargaining agreements with the Union. The agreements between the Union and these Trade Associations have for a number of years been the model for agreements between the Union and other contractors who do not belong to the Trade Associations. In 1979, however, the Trade Associations and the Union could not agree on contract terms prior to the termination of the existing contract. Soon after the contract expired, the Union directed its members to engage in selective picketing and strikes against certain contractor members of the Trade Associations. The Trade Associations responded to this action by directing all their members to engage in a defensive lockout of the Union. (App. C, pp. 39a - 40a).

Newberg had contracted with Commonwealth Edison to perform construction work at sites located in Braidwood and Romeoville, Illinois. ("Commonwealth Projects"). (App. C, p. 41a). Two (2) other contractors, Morrison Construction Company ("Morrison") and Getschow Construction Company ("Getschow"), neither of which was named as a Defendant, were also engaged in performing construction work at the Commonwealth Projects. These projects were subject to strikes and lockouts commencing during July, 1979.

Edison moved to prevent a work stoppage on the projects by entering into an agreement with the Union whereby Edison would pay into an escrow account $2.25 per employee for each hour worked during the strike by employees of Newberg and Edison's other contractors. (App. C, p. 42a). The Contractors were to pay their carpenter employees for their work at the wage rate prevailing as of the prior collective bargaining agreement. The additional amount deposited in the escrow account was to be released in accordance with any collective bargaining agreement negotiated by the Union and the Trade Associations. Thus, if the agreement ultimately reached between the Union and the Trade

Associations called for a lesser amount of wage increase, that amount would be paid out of the escrow fund and the remainder would be returned.

At the time these events occurred, Newberg employed approximately twenty-five percent of the Will County Union carpenters on its Edison Projects, and these workers returned to work after the escrow agreement was reached. Approximately four weeks later, on August 20, the Trade Associations and the Union agreed to a $2.25 per hour minimum wage increase retroactive to June 1, 1979. (App. C, p. 43a).

One of the Trade Associations first filed a charge with the National Labor Relations Board alleging that the Union had failed to bargain in good faith. This charge was rejected by the Board. The Board refused to issue a complaint. Letter from Alex V. Barbour, Regional Director, to Charles E. Murphy (Sept. 6, 1979) (Re: Carpenters District Council of Will County and Vicinity (Mid-America Regional Bargaining Association) Case 13-CB-8611).

Subsequently, the Petitioners filed their complaint in the instant case.

3.

The Decision of the District Court

The District Court granted the Defendants' motion to dismiss the complaint on February 11, 1981.

The court found that the only direct restraint alleged in the complaint was a restraint in the market for human labor. Such a restraint, the court found, is exempt from antitrust scrutiny under the "labor exemption" created by §§6 and 20 of the Clayton Act, 15 U.S.C. §17 and 29 U.S.C. §52 and §§4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§104, 105 and 113. The court ruled, therefore, that the complaint failed to state a claim upon which relief could be granted. (App. B, p. 30a).

4.

The Decision of the Court of Appeals

The Court of Appeals unanimously affirmed the District Court's decision holding that the Petitioners failed to plead adequate allegations of conspiracy to remove this case from both the statutory and non-statutory labor exemptions. The Court concluded therefore, that the Respondents' activities were immune from anti-trust liability. (App. A pp. 24a - 25a). With respect to the statutory exemption, the Court initially quoted the Clayton Act; "The labor of a human being is not a commodity or article of commerce." Section 6 of the Clayton Act, 15 U.S.C. §17. The Court of Appeals held that the statutory exemption applied to collective bargaining agreements, and that the escrow agreement was "similar to a traditional collective bargaining agreement". (App. A, p. 11a, n. 14). Therefore, the Court of Appeals concluded that since collective bargaining was involved, the statutory labor antitrust exemption applied. (App. A, pp. 12a, n. 15, 14a). With respect to the non-statutory exemption, the Court of Appeals concluded that the Petitioners' well pleaded facts failed to demonstrate a concerted anti-competitive purpose. There was no single shared purpose, each party had its own separate and distinct purpose. Furthermore, the only anti-competitive purpose alleged was possessed by Newberg. Yet the complaint failed to plead even this interest properly, for it alleged that Edison agreed to "pressure" its contractors into signing the escrow agreement with the Union (App. C, p. 42a). Thus, the complaint alleged that the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into acting by a non-labor entity lacking anti-competitive intent. (App. A p. 17a).

REASONS FOR DENYING THE WRIT

1.

The Decision below does not conflict with decisions of this Court nor does it impermissibly expand the scope of the labor exemptions to antitrust laws.

In its Petition, the Petitioners assert that the escrow agreement is not exempt from the antitrust laws. The Petitioners fail to demonstrate how the lower court's determination that the escrow agreement, insofar as wages are concerned, is contrary to any of the decisions discussed in the Petition.

The Petitioners incorrectly assert that the statutory exemption is applicable only to unilateral union activity and can only be asserted by unions. *Snyder Company* v. *ASC*, 677 F.2d 1111, 1118, n. 10 (6th Cir. 1982) is cited not for its substance or its ultimate decision, but for a footnote that is dicta and as quoted in the Petition is misleading. The full quote states:

> The "statutory" exemption was created by congress in sections 6 and 20 of the Clayton Act, 15 U.S.C. §§17 and 29 U.S.C. §52, and in the Norris-LaGuardia Act, 29 U.S.C. §§101 et seq. This exemption can only be asserted by a labor organization itself and will be lost if the union combines or conspires with a non-union group to restrain trade. See, e.g., Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 16 LRRM 798 (1945). The "non-statutory" exemption was created by the Supreme Court to exempt agreements between unions and employers. These agreements are not exempt under the statutory exemption because the unions are not acting unilaterally, but the court has concluded that they should be exempt nevertheless as "a proper accommodation between congressional policy favoring collective bargaining. Under the NLRA and the congressional policy favoring free competition in business markets." Connell v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622, 89 LRRM 2401 (1975). Because Defendants in the present case

> are not labor organizations, they cannot assert the statutory exemption. *Employers, however, as well as labor unions, have successfully raised the nonstatutory exemption for provisions arising from collective bargaining agreements.* See McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979). See; Mackey v. National Football League, 543 F.2d 606, 612 (8th Cir. 1976), cert. dism'd, 434 U.S. 801 (1977). (Emphasis added)

The Court of Appeals also dismissed the argument that only unions can assert the statutory exemption by concluding with substantial support that:

> Although both the statutory and the non-statutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemption would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment . . . Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3rd Cir. 1974). *See also*, Amalgamated Meat Cutters & Butchers Local 576 v. Wetterau Foods, Inc., 574 F.2d 133, 136 (8th Cir. 1974); Mackey v. NFL, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). (App. A p. 19a n. 22).

The Petitioners in their argument, assume that sufficient facts were pleaded to create a conspiracy with a non-union group to restrain trade. However the Court of Appeals held that the Petitioners "failed to properly plead such conspiracy." (App. A, pp. 17a - 18a).

The Petitioners assert that the lower court's decision is in conflict with *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945). This is simply not accurate. *Allen Bradley* involved more than an agreement between a union and a group of non-labor entities concerning wages. In *Allen Bradley* there was a

combination consisting of contractors, manufacturers and a union which had the effect of freezing out competitors and resulted in the establishment of an anticompetitive price. The combination was created with the obvious intent of effectively driving those contractors who were not parties to it out of business in the New York area.

In those instances where the alleged conspiracy was based solely upon a collective bargaining agreement which concerned mandatory subjects of bargaining, courts have generally held that the statutory exemption from the antitrust law is applicable. Thus, the Court of Appeals' decision is not in conflict with the following cases which were cited in the Petition but not shown to be in conflict with the Court of Appeals' decision in the instant case. *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100*, 421 U.S. 616 reh. denied, 423 U.S. 884 (1975); *see also*, e.g., *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1980), cert. granted, U.S. , 102 S. Ct. 998 (1982); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

Nor are the cases cited in the Petition concerning the non-statutory exemption in conflict with the decision of the Court of Appeals in this case. The Petitioners concede that the non-statutory exemption was created by the courts to exempt bona fide collective bargaining agreements between unions and employers, the anticompetitive effects of which are consistent with national labor policy.

The Petitioners assert that *Connell Construction Co. v. Plumbers and Steamfitters Local No. 100*, 421 U.S. 616 (1975) requires the existence of a collective bargaining relationship in order to permit a party to benefit from the non-statutory labor exemption. The Petitioners then patently mis-state the Court of Appeals

decision by saying that "The Court below totally ignored this crucial requirement". The Court below specifically addressed that issue at Appendix A, p. 11a n. 14:

> Although the alleged "escrow agreement" between Newberg and the district union was not, strictly speaking, a collective bargaining agreement, the cases discussed herein are nevertheless applicable.

The agreement reached was the functional equivalent of a traditional collective bargaining agreement: it involved an employer and the collective bargaining agent of its employees over a subject of mandatory bargaining — wages. The fact that the final wage rate increase was not determined, but depended upon an external factor — the size of the wage increase to be later agreed upon by the Trade Associations and the Union — does not change the nature of the agreement. The cases holding that a collective bargaining agreement should not serve as the sole evidence of a conspiracy do not focus upon the formal requirements of a collective bargaining agreement. Rather, they focus upon the inappropriateness of basing a finding of antitrust conspiracy on an agreement reached as a result of the collective bargaining *process* commanded by the labor laws. A narrower reading of these cases would do substantial damage to the Norris-LaGuardia Act's goal of "full freedom...to negotiate the terms and conditions of...employment," 29 U.S.C. §102, as well as the National Labor Relations Act's goal of reducing "industrial strife and unrest." 29 U.S.C. §151.

The Petitioners spend a great deal of time discussing the parameters of the *Connell* decision, but fail to attempt to overcome the lower court's holding that a complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the non-statutory exemption. Restraints operating primarily upon the labor market will fall within the scope of the exemption, regardless of any indirect effects that they may be alleged to have upon commercial competition. An examination of the Petitioners' complaint in the light of

the non-statutory exemption demonstrates the dismissal of the Petitioners' complaint was proper. The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny.

In addition, *Connell* is factually different from the case at bar. In *Connell*, the agreement in question did not simply involve wages, rather it sought to directly affect the business market by requiring Connell to subcontract work to only one group of contractors and prohibit the company and other signatory contractors from subcontracting to anyone else. The same "harmonizing" of the two policies is offended as in *U.M.W. v. Pennington*, 381 U.S. 657 (1965) and *Allen Bradley*.

In these two cases, where the labor exemption was not found to apply, there were Agreements that had two common characteristics. First, the Agreements did not deal with wages alone. Second, the Agreements resulted in a direct restraint in the business or product market. Where these two factors are present, it has been determined that an exception to the labor exemption is appropriate to prevent misuse of the exemption by business interests attempting to reduce or eliminate competition.

In the instant case the only Agreement was to place monies in escrow to be used towards paying such wage increase as would be negotiated at some future time by and between the Union and the Trade Associations. There was no Agreement to impose any wage increase or any other condition on anyone. More importantly, even if there were a direct restraint imposed by the agreement, it would not constitute a direct restraint on the business market, but a direct restraint on the labor market.

Therefore, the portion of the Court of Appeals' decision concerning the non-statutory exemption is not in conflict with the cases loosely referred to in the Petitioners' first argument.

2.

The decision below found that the Petitioners failed to allege a shared purpose between the Union and non-labor entities to restrict competition.

The Petitioners attempt to rectify their failure to plead sufficient facts in their complaint by stating "the instant case presents a more complex factual situation." The Court of Appeals properly found that the only anti-competitive purpose alleged was possessed by Newberg. Thus, the only party who might reap an anti-competitive benefit from the agreement did not in fact seek that result, but was forced into such conduct by a non-labor entity lacking anti-competitive intent. An agreement to impose conditions on others is the key element which was missing in the complaint. Absent such an agreement, the labor exemption is not forfeited.

The Petitioners attempt to distinguish *Pennington* is decidedly weak and is wholly unsupported by any cases. A critical element in each of the three cases in which the court found the labor exemption to be inapplicable was the existence of a concerted anti-competitive purpose. The complaint does not allege a concerted purpose shared by the Respondents to disfavor the employers who are not a party to the escrow agreement. The Fifth Circuit has concluded:

> ...in cases falling within the Pennington model, for nonexemption and liability to be found the union must be proved to have had a purpose to injure or eliminate the competitor of a company whose employees it represents. See e.g., Bodine Produce, Inc., v. United Farm Workers, 494 F.2d 531 (9th Cir. 1974). Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974).

The Ninth Circuit has concluded that to state "a claim under the Sherman Act, one must allege that an agreement has either an anti-competitive purpose or a substantial anti-competitive

effect." *California State Council of Carpenters, v. Associated General Contractors of California, Inc.*, 648 F.2d 527 (9th Cir. 1981), Cert. granted U.S. 102 S.Ct. 998 (1982).

The Fourth Circuit would impose an even stricter standard in what is referred to as a *"Pennington*-type case." Referring to an agreement between a union and an employer group the Court stated:

> To amount to an antitrust violation the agreement must be rooted in an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws. *Smitty Baker Coal Co., Inc. v. U.M.W.*, 620 F2d 416 (4th Cir. 1980).

The most recent decision in this Court dealing with the labor exemption, shows that the existence of a concerted anticompetitive purpose is of vital importance. Mr. Justice Stewart recently noted that "anti-trust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade." *H. A. Artists and Associates, Inc. v. Actors' Equity Association* 451 U.S. 704, 715 (1981).

CONCLUSION

Because there has been no misapplication of law, no conflict among the Circuits, no issue of substantial importance to the public which this Court should decide and for the other reasons stated in this Brief, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A.

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

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No. 82-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO., and U. S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

COMMONWEALTH EDISON COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED*

The Petitioners' statement of the questions presented includes the assertion that the Complaint alleges a broad anticompetitive conspiracy "to drive ... competitors out of business by imposing high wages on them." The Court of Appeals for the Seventh Circuit, in unanimously affirming the District Court's dismissal of the Complaint, expressly found that such a conspiracy was not alleged. (App. A, pp. 10a, 11a, 15a, 16a, 17a.) Therefore, the following questions are presented:

1. Does Section 1 of the Sherman Act reach an arrangement between a union, a contractor, and the contractor's customer which concerns only the wages to be paid to union members for work done on the customer's job site, when no other contract, combination or conspiracy is alleged?

2. Is Section 1 of the Sherman Act violated if—in the absence of an anticompetitive conspiracy involving any business market—a union, a contractor, and the contractor's customer agree that in exchange for labor peace at the customer's job site, the customer will bear the cost of the contractor's paying the amount of a proposed hourly wage increase into an escrow account, from which retroactive wages will, at the conclusion of a labor dispute, be released to union members for work performed on that job site in accordance with whatever wage level is later determined by collective bargaining between the union and a multi-employer bargaining group?

3. Was the Seventh Circuit correct when it followed the lead of the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits in ruling that under this Court's decision in *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), before

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* Respondent Commonwealth Edison Company has no subsidiary or affiliated corporations which it does not wholly own.

an agreement concerning only wages can be held to violate the antitrust laws, the parties to the agreement must share an anticompetitive purpose and the alleged non-union conspirators must stand to benefit competitively from the agreement?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW AND JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Statement of Facts	3
B. Nature of the Proceedings	5
REASONS FOR DENYING THE PETITION	6
I. The Seventh Circuit's Finding That the Escrow Agreement Is Protected by the Statutory Labor Exemption Is Consistent With Prior Decisions by This Court and Other Circuit Courts	8
II. The Court Below Correctly Applied the Nonstatutory Labor Exemption to This Case	12
CONCLUSION	16
SUPPLEMENTAL APPENDIX	1a

TABLE OF AUTHORITIES

PAGE

Cases

Allen Bradley Co. v. *Local 3, IBEW*, 325 U. S. 797, *reh. denied*, 326 U. S. 803 (1945) 10

Altemose Construction Co. v. *Atlantic Cape May etc.*, 493 F. Supp. 1181 (D. N. J. 1980) 13

Amalgamated Meat Cutters v. *Wetterau Foods Inc.*, 597 F. 2d 133 (8th Cir. 1979) 9, 11, 14

Apex Hosiery Co. v. *Leader*, 310 U. S. 469 (1940) .. 10

Bodine Produce, Inc. v. *United Farm Workers Organizing Committee*, 494 F. 2d 541 (9th Cir. 1974) 11

California State Council of Carpenters v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982) 13

Carpenters District Council v. *United Contractors Ass'n*, 484 F. 2d 119 (1973), *modified on other grounds*, 539 F. 2d 1092 (5th Cir. 1976) 14

Columbia River Packers Ass'n v. *Hinton*, 315 U. S. 143 (1942) 14

Connell Construction Co. v. *Plumbers and Steamfitters Local 100*, 421 U. S. 616 (1975) 6, 10, 12

Consolidated Express, Inc. v. *New York Shipping Ass'n*, 602 F. 2d 494 (3d Cir. 1979), *vacated*, 448 U. S. 901 (1980) 13

Embry-Riddle Aeronautical University v. *Ross Aviation, Inc.*, 504 F. 2d 896 (5th Cir. 1974) 11

Granddad Bread, Inc. v. *Continental Baking Co.* 612 F. 2d 1105 (9th Cir. 1979), *cert. denied*, 449 U. S. 1076 (1981) 13

Hunt v. *Crumboch*, 325 U. S. 821 (1945) 10

International Ass'n of Heat & Frost Insulators v. *United Contractors*, 483 F. 2d 384 (3rd Cir. 1973) 14

PAGE

James Julian, Inc. v. *Raytheon Co.*, 499 F. Supp. 949 (D. Del. 1980) 13

Larry V. Muko, Inc. v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978) ... 13

Local No. 189, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U. S. 676 (1965) 10

Los Angeles Meat & Provision Drivers' Union v. *U. S.*, 371 U. S. 98 (1962) 14

Mackey v. *National Football League*, 543 F. 2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977) 9

National Constructors Assn'n v. *National Electrical Contractors Ass'n, Inc.*, 498 F. Supp. 510 (D. Md. 1980), *aff'd*, 678 F. 2d 487 (4th Cir. 1982) . 13

Ramsey v. *United Mine Workers*, 481 F. 2d 742 (6th Cir.), *cert. denied*, 414 U. S. 1067 (1973) ... 11

Scooper Dooper, Inc. v. *Kraftco Corp.*, 494 F. 2d 840 (3d Cir. 1974) 9

Smitty Baker Coal Co. v. *United Mine Workers*, 620 F. 2d 416 (4th Cir.), *cert. denied*, 449 U. S. 870 (1980) 11, 12

Snyder Co. v. *Associated General Contractors*, 677 F. 2d 1111 (6th Cir. 1982) 9, 12

Tugboat, Inc. v. *Mobile Towing Co.*, 534 F. 2d 1172 (5th Cir. 1976) 14

United Mine Workers v. *Pennington*, 381 U. S. 657 (1965) 6, 9, 10, 11, 15

United Mine Workers v. *Gibbs*, 383 U. S. 715 (1966) 5, 6

United States v. *Brims*, 272 U. S. 549 (1926) 10

United States v. *Hutcheson*, 312 U. S. 219 (1951) .. 10

PAGE

Statutes

15 U. S. C. § 1, Sherman Act § 1 5
15 U. S. C. § 17, Clayton Act § 6 8
29 U. S. C. § 52, Clayton Act § 20 8
29 U. S. C. § 104, Norris-LaGuardia Act § 4 8
29 U. S. C. § 113, Norris-LaGuardia Act § 13 8

Miscellaneous

Cox, *Labor and Antitrust—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1955) 7

IN THE

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OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO., and U. S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY, and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

COMMONWEALTH EDISON COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Commonwealth Edison Company ("Edison") submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by Petitioners on July 12, 1982.

OPINIONS BELOW AND JURISDICTION

Edison adopts those portions of the Petition entitled "Opinions Below" and "Jurisdiction" but adds that the opinion of the Court of Appeals entered on April 13, 1982 is reported at 675 F. 2d 881.

STATUTES INVOLVED

Petitioners have failed to identify or set forth those portions of the Clayton Act (15 U. S. C. § 12 *et seq.*), the Norris-LaGuardia Act (29 U. S. C. § 101 *et seq.*), and the National Labor Relations Act (29 U. S. C. § 151 *et seq.*) which the Court of Appeals for the Seventh Circuit reviewed in order to find that the statutory labor exemption to the antitrust laws applies to this case. Accordingly, Edison sets forth the relevant portions of those statutes in the Supplemental Appendix attached hereto.

STATEMENT OF THE CASE

A. *Statement of Facts*

The Petitioners in this case include three trade associations (the "Associations") which have historically enjoyed a monopoly in the business of representing contractors in Will County, Illinois in collective bargaining negotiations. That is, the labor agreements which the Associations have negotiated have typically been adopted by all contractors in the county, including nonmembers of the Associations. (App. C, p. 38a.) Additionally, two contractor members of the Associations (the "Contractors") joined in the Complaint and are Petitioners herein. The Respondents are Will County Carpenters District Council and its international union (the "Unions"), both engaged in the representation of carpenters in collective bargaining; Edison, a public utility providing electric service to northern Illinois; and Gust K. Newberg Construction Co. ("Newberg"), a general contractor which, in 1979, was constructing a nuclear generating station and another power plant for Edison in Will County.

Collective bargaining agreements which the Associations had previously negotiated with the Unions expired on May 31, 1979. After the Associations and the Unions were unable to negotiate a new agreement, the local Union directed its members to engage in selective picketing and strikes against certain contractor members of the Associations. The Associations responded by directing all of their members to defensively "lock out" the Union members. Although Newberg was not a member of any of the Associations, the Edison projects were subject to these strikes and lockouts.

To prevent further expensive work stoppages on its projects, Edison allegedly agreed with the Unions that it would "pressure" Newberg, as well as its other contractors,[1] to pay

[1] Edison's other contractors, who were members of one of the Associations, were not named as defendants although they allegedly participated in the "Escrow Agreement" described above.

into an escrow account $2.25 for each hour worked during the strike by Union members on the Edison projects. (App. C, p. 42a.) Pursuant to this so-called "Escrow Agreement," Edison's contractors were to pay this money into the escrow account for all work done since the expiration of the previous contract on June 1, 1979. At the conclusion of the strike, wages retroactive to that date would be paid to union members out of the escrow account at whatever wage level was ultimately determined through collective bargaining between the Unions and the Associations. Edison agreed to compensate its contractors for this additional expense, and the Unions agreed that their members would continue work on the Edison projects and not strike or picket there.

Approximately, four weeks after the Escrow Agreement was reached, the Associations and the Unions agreed to a $2.25 per hour wage increase retroactive to June 1, 1979.[2]

In the Petition, Petitioners assert, and frequently imply, that the Complaint alleges that the Escrow Agreement was part of a broader conspiracy "to drive [Newberg's] competitors out of business." (Pet. at i (Questions Presented), 12, 13.) However, the Seventh Circuit expressly found that the Complaint, when stripped of its unsupported, conclusory allegations, cannot be fairly read "to allege the existence of a conspiracy apart

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[2] In their Statement of Facts, Petitioners assert that the "Associations were forced to capitulate to the Union's demands." (Pet., p. 5.) Elsewhere in the Petition, they state that Respondents conspired to "impose the terms of the Escrow Agreement on all Will County Carpenters." (Pet., pp. 8-9, 12, 13.) Despite these claims in the Petition, the Seventh Circuit correctly found:

> "There is no allegation in the plaintiffs' complaint that the union adopted a 'take it or leave it' stance in negotiations with the plaintiff contractors. Indeed, the National Labor Relations Board found this was not the case.... Thus, all that can be inferred from the escrow agreement is a promise by the employer to be bound by any wage increase, up to $2.25 per hour, that the union could negotiate with other contractors. Such agreements have never been held violative of the antitrust laws." (App. A, p. 14a.)

from the [escrow] agreement." (App. A, p. 10; *see also* App. A, pp. 4a, 5a.) Indeed, the Court of Appeals found that the factual allegations of the Complaint are inconsistent with the conclusory allegations which Petitioners now assert in the Petition concerning conspiracy and anticompetitive intent.[3] (App. A, p. 17a.) Edison stressed this very point before both the district court and the appellate court; yet, Petitioners never attempted to amend their Complaint. It is too late for them now to claim in their Petition the existence of a broader conspiracy which they were unwilling to assert below. The only question properly before this Court, therefore, is the legality under Section 1 of the Sherman Act of the alleged Escrow Agreement, standing alone.

B. *Nature of the Proceedings*

The Petitioners filed their Complaint on April 15, 1980, alleging that the Respondents had violated Section 1 of the Sherman Act, tortiously interfered with the Associations' contractual relations, and engaged in a civil conspiracy to interfere with the Associations' contractual relations.

On February 11, 1981, the Honorable Frank J. McGarr of the United States District Court for the Northern District of Illinois granted Edison's Motion to Dismiss, finding that the Complaint fails to state a claim upon which relief can be granted under Section 1 of the Sherman Act.[4] On April 13,

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[3] Despite the conclusory statements in the Petition that Respondents conspired to enhance Newberg's competitive position vis-a-vis other contractors, the appellate court found that the Complaint specifically alleges that Newberg "was forced into acting by a non-labor entity [Edison] lacking anticompetitive intent." (App. A., p. 17a.)

[4] Edison moved to dismiss the Complaint on the grounds that it fails to state a claim under Section 1 of the Sherman Act; that because the Sherman Act claim fails, the pendent state law claims should be dismissed under *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966); that the Associations have no standing to maintain the action under either Section 4 or 16 of the Clayton Act; that the state law

(Footnote continued on following page.)

1982, the Court of Appeals for the Seventh Circuit unanimously affirmed the District Court's decision.

The Seventh Circuit found three separate grounds for the alleged Escrow Agreement's exemption from antitrust attack. First, the Court of Appeals held that the statutory labor exemption to the antitrust laws applies to this case. Because the only conspiracy alleged is the existence of the Escrow Agreement, the Complaint fails to properly "plead a conspiracy that would remove the alleged agreement from the coverage of the [statutory] labor exemption" to the antitrust laws. (App. A, pp. 7a-14a.) Furthermore, under a separate analysis, the Court found the Complaint fails to meet the specific criteria of *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), in which this Court answered the question: under what circumstances might wage agreements become actionable under the antitrust laws? (App. A, pp. 15a-17a.) Finally, the Court of Appeals held that even if Petitioners had properly pleaded a conspiracy between a union and "non-labor entities," the nonstatutory labor exemption to the antitrust laws applies here because the Complaint does not allege a direct restraint upon a business market, but only an indirect restraint that would "follow naturally from the elimination of competition over wages." (App. A, pp. 18a-24a; quoting from *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U. S. 616, 626 (1975).)

REASONS FOR DENYING THE WRIT

The decision below is fully supported by prior cases and creates no clear conflict between the circuits. Moreover, even if the Petitioners were correct that the Seventh Circuit's decision

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(Footnote continued from preceding page.)

claims are pre-empted by federal labor law; that the tortious interference allegations do not state a claim under Illinois common law; and that the civil conspiracy claim is superseded by Illinois statute. The District Court addressed only the first issue when it dismissed the Complaint, and the Seventh Circuit held that dismissal of the pendent state claims was proper under *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). (App. A, p. 4a.)

with respect to one finding or another somehow conflicts with decisions of this Court or of other circuits, the result in this case would not differ, because there were multiple grounds for the appellate court's decision.

Put simply, there is no case which has ever held that an agreement concerning only wages violates any antitrust law, when there is no further allegation of a conspiracy to fix prices, restrict output, or allocate or monopolize markets. Newberg was perfectly free to enter into the Escrow Agreement—or, for that matter, to agree conclusively on an hourly wage—with the Unions, and Edison's agreement to pay the increased cost in order to avoid expensive work stoppages on its construction projects implicates no antitrust considerations. Indeed, the conduct alleged is legally indistinguishable from an allegation that a contractor, working under a "cost plus" arrangement, has entered a wage agreement that other contractors find burdensome. Yet, it would be inconceivable that "cost plus" arrangements would, for that reason, be found to run afoul of the antitrust laws.

The Complaint alleges only that in return for labor peace at a job site, a union, a contractor, and the contractor's customer reached an agreement concerning wages to be paid at that job site. Twenty-seven years ago, Professor Cox wrote, "No one seriously contends that antitrust policy should be concerned with the labor market per se." Cox, *Labor and Antitrust*, 104 U. Pa. L. Rev. 252, 254 (1955). Yet, Petitioners have contended just that, attempting to raise an agreement on wages to the level of an antitrust violation. The time has come to end Petitioners' efforts to turn the clock back on labor and antitrust law,[5] by leaving intact the Seventh Circuit's common sense ruling that a wage agreement, standing alone, is beyond the reach of the antitrust laws.

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[5] In the early part of this century, the antitrust laws were repeatedly used to attack union activities, and Congress legislatively overruled those decisions consistently. *See*, App. A, pp. 5a, 6a.

I.

The Seventh Circuit's Finding That The Escrow Agreement Is Protected By The Statutory Labor Exemption Is Consistent With Prior Decisions By This Court And Other Circuit Courts.

The Seventh Circuit ruled that because the only factual allegation of conspiracy in the Complaint was the existence of the Escrow Agreement—which concerned only the subject of wages—the alleged conduct was protected from antitrust scrutiny by the statutory exemption to the antitrust laws.[6] In holding

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[6] Section 6 of the Clayton Act, 15 U. S. C. § 17, provides in relevant part:

> The labor of a human being is not a commodity or article of commerce. . . .

Section 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104, prohibits any court from issuing:

> any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit *any person . . . interested in such dispute* (as these terms are herein defined) *from doing, whether singly or in concert,* any of the following acts: . . .
>
> > (c) *Paying or giving to . . . any person, participating or interested in such labor dispute . . . moneys or things of value;*. . . . (emphasis added)

See also, Section 20 of the Clayton Act, 29 U. S. C. § 52. Section 13 of the Norris-LaGuardia Act, 29 U. S. C. § 113, shows that Edison was a person "interested in a labor dispute":

> (b) *A person . . . shall be held to be a person participating or interested in a labor dispute if . . . he . . . has a direct or indirect interest therein. . . .*
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions or employment, . . . *regardless of whether or not the disputants stand in the proximate relation of employer and employee.* (emphasis added)

See, New Negro Alliance v. *Sanitary Grocery Co.,* 303 U. S. 552 (1938) (civic organization was "person interested in labor dispute" concerning defendant's personnel policies toward black employees). *See generally,* Supplemental Appendix attached hereto.

that an agreement concerning only wages falls within the statutory labor exemption to the antitrust laws, the Seventh Circuit was consistent with prior cases from this Court and other circuits.

Petitioners claim that the decision below conflicts with prior decisions in two respects. First, they claim that only the Unions, and not Edison or Newberg, can assert the statutory exemption. The Seventh Circuit's common sense answer to this claim shows that no such conflict exists.[7]

> "Although both the statutory and the non-statutory exemptions are generally phrased as exemptions for union behavior, logic dictates that they be applied to all parties when an agreement with a union forms the basis of a complaint. The exemption would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements. Other circuits have concurred in this judgment.... *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d. 840, 847 n. 14 (3d Cir. 1974). *See also, Amalgamated Meat Cutters & Butchers Local 576* v. *Wetterau Foods, Inc.*, 597 F. 2d 133, 136 (8th Cir. 1974); *Mackey* v. *NFL*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801 (1977)."

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[7] In order to create the illusion of a conflict between the circuits, Petitioners cite to a footnote in *Snyder Co.* v. *Associated General Contractors*, 677 F. 2d 1111, 1118, n.10 (6th Cir. 1982), a case brought by employers against employers. However, the Sixth Circuit's *Snyder* footnote, which briefly discusses the statutory and nonstatutory labor exemptions, is mere dicta, since the court did not even analyze the case in terms of those exemptions, but instead compared the facts with *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), in which this Court "addressed allegations substantially the same as those made by plaintiffs in the present case [*Snyder*]." 677 F. 2d at 1118. Of course, the Seventh Circuit here also used "*Pennington* as a distinct mode of analysis," and found that even under that analysis, the Complaint fails to state a cause of action. (App. A, p. 15a.)

(App. A, pp. 17a, 18a.) *See also, Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616, 622 (1975).[8]

Petitioners argue further that the decision below conflicts with prior decisions because it affords a statutory exemption to the Escrow Agreement, which by definition is an agreement among a union and non-unions. Any such agreement, say the Petitioners, is a "combination of labor and non-labor entities" which is not entitled to protection from antitrust scrutiny. Petitioners apparently propose to argue before this Court, as they did below, that union activity that falls within the language of the exempting statutes, and that attempts to influence the conduct of others, is protected only so long as that conduct is unsuccessful. That is, under the Petitioners' view of labor law, once the non-union party agrees to act in accordance with the union's desires, the statutory exemption would be forfeited—and the union would be vulnerable to antitrust attack.

It is the Petitioners' position, and not the decision below, which has no support in prior decisions. The decisions of this Court are clear that an illegal "combination of labor and non-labor entities" occurs, and the statutory labor exemption is forfeited, only when union activity is undertaken to aid and abet an anticompetitive conspiracy of business interests. *Local No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965); *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965); *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U. S. 797, *reh. denied,* 326 U. S. 803 (1945); *Hunt* v. *Crumboch,* 325 U. S. 821 (1945); *United States* v. *Hutcheson,* 312 U. S. 219 (1941); *Apex Hosiery* v. *Leader,* 310 U. S. 469 (1940); *United States* v. *Brims,* 272 U. S. 549 (1926). Here, the Court of Appeals expressly found that no such conspiracy was alleged.

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[8] Conduct protected from injunction pursuant to Section 4 of the Norris-LaGuardia Act is also exempt "from the operation of the antitrust laws," *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616, 622 (1975), and cannot lay the basis for a damage claim under Section 4 of the Clayton Act, 15 U. S. C. § 15.

The Seventh Circuit also found that the allegations of the Complaint fail to meet the requirements of *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), which addressed the issue: in what circumstances might a wage agreement become a vehicle or guise for commercial restraints and therefore unworthy of the statutory exemption? The appellate court's decision is perfectly consistent with *Pennington* and other decisions of this Court and other circuits in holding that before a wage agreement can be held to violate the antitrust laws, the parties to the agreement must share an anticompetitive purpose and the alleged non-union conspirators must stand to benefit competitively from the agreement. *See, Smitty Baker Coal Co.* v. *United Mine Workers*, 620 F. 2d 416, 432 (4th Cir.), *cert. denied*, 449 U. S. 870 (1980); *Embry-Riddle Aeronautical University* v. *Ross Aviation, Inc.*, 504 F. 2d 896, 903 (5th Cir. 1974); *Bodine Produce, Inc.* v. *United Farm Workers Organizing Committee*, 494 F. 2d 541, 560-61 (9th Cir. 1974); *Amalgamated Meat Cutters* v. *Wetterau Foods, Inc.*, 597 F. 2d 133, 136 (8th Cir. 1974); *Ramsey* v. *United Mine Workers*, 481 F. 2d 742 (6th Cir.), *cert. denied*, 414 U. S. 1067 (1973). Applying those accepted standards, the court below found that when it is alleged that a union seeking higher wages and a utility seeking to have work continue on its expensive construction projects, agree that the utility will "pressure" its contractor—the only party who could conceivably reap any anticompetitive benefit—into signing an "escrow agreement," those allegations are "inadequate to fall with the *Pennington* model." (App. A, p. 17a.)

Petitioners totally distort the appellate court's opinion when they argue: "However, it cannot be seriously contended that [Edison's] participation immunizes an agreement which otherwise would be unlawful." (Pet., p. 12.) The Seventh Circuit specifically found that the Complaint's factual allegations negate any possible inference of anticompetitive intent by Newberg; therefore, no *Pennington* claim can be made out

against Newberg. *See, Snyder Co.* v. *Associated General Contractors,* 677 F. 2d 1111 (6th Cir. 1982); *Smitty Baker Coal Co.* v. *United Mine Workers,* 620 F. 2d 416, 432-33 (4th Cir.), *cert. denied,* 449 U. S. 870 (1980). Newberg was perfectly free to enter the Escrow Agreement, or any wage agreement, with the Unions, and the fact is that it cannot be seriously contended that a wage agreement between a contractor and a union becomes an antitrust violation merely because the contractor's customer, a utility with no possible anticompetitive interest, agrees to pay some or all of the incremental cost of the new wages.

II.

The Court Below Correctly Applied The Nonstatutory Labor Exemption To This Case.

The nonstatutory labor exemption represents a judicial recognition that certain labor-related activities, which are not expressly provided for by statute, must be immune from antitrust attack if national labor policy is not to be thwarted by the application of the antitrust laws. The Seventh Circuit held that the alleged Escrow Agreement, because it concerned only the labor market and imposed no restraint on a commercial or business market, implicated no serious antitrust concerns and was therefore deserving of the nonstatutory labor exemption.

Petitioners hope to avoid this common sense result by claiming that the decision below conflicts with other decisions because it applies the nonstatutory exemption although Edison is not the employer of the Unions' members. To support this assertion, Petitioners point to *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U. S. 616 (1975), and its progeny.[9] But, in the *Connell*-type cases, plaintiffs have alleged that the union-employer agreement imposed a direct

[9] In *Connell,* a local union forced the plaintiff general contractor, which did not employ the union's members, to agree to stop employing subcontractors which were not parties to the union's current collective bargaining agreement; *i.e.,* the union imposed a direct restraint in the subcontracting commercial market.

restraint on a commercial or business market. *Id.* at 622-626; *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 998 (1982); *Larry V. Muko, Inc.* v. *Southwestern Pennsylvania Trades Council*, 609 F. 2d 1368 (3d Cir. 1978); *James Julian Inc.* v. *Raytheon Co.*, 499 F. Supp. 949 (D. Del. 1980); *National Constructors Association* v. *National Constructors Association* v. *National Electrical Contractors Association, Inc.*, 498 F. Supp. 510 (D. Md. 1980), *aff'd*, 678 F. 2d 487 (4th Cir. 1982); *Altemose Construction Co.* v. *Atlantic, Cape May, etc. Building Trades Council*, 493 F. Supp. 1181 (D. N. J. 1980). It is only then—when the alleged restraint "would not follow naturally from the elimination of competition over wages"—that the nonstatutory labor exemption requires balancing of labor and antitrust concerns. *Connell*, 421 U. S. at 626. *See, Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 602 F. 2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, 448 U. S. 901 (1980); *Granddad Bread, Inc.* v. *Continental Baking Co.*, 612 F. 2d 1105, 1110 (9th Cir. 1979), *cert. denied*, 449 U. S. 1076 (1981). When, as here, plaintiffs allege only an agreement concerning the price to be paid for human labor, all that is alleged is an agreement "the anticompetitive effects of which are consistent with national labor policy." (Pet., pp. 8, 10).

Petitioners' argument that labor policy has been violated here is nothing more than a thinly-veiled attempt by the Associations to maintain their historic monopoly over collective bargaining in Will County.[10] They argue:

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[10] Petitioners argue that the decision below creates a conflict because there was no "*bona fide* collective bargaining agreement" between Edison and the Unions. But, Petitioners have never pointed to any case in which the nonstatutory exemption was denied to a pure wage agreement on that basis. Indeed, the foundation of Petitioners' semantic argument was exposed below to be a series of "sham union" or "sham collective bargaining agreement" cases in which employers established and dominated sham unions and entered sham collective bargaining agreements in order to impose restraints on product

(Footnote continued on following page.)

> "[T]he Associations could not exert any countervailing economic pressure on [Edison] since it was outside of the collective bargaining relationship between the Union and the Associations. . . . Thus, the level of carpentry wages was not established through the 'give and take' of collective bargaining where the respective economic strengths of union and employer determine the outcome." (Pet., p. 10.)

Yet, Newberg certainly had every right to settle the labor dispute with the Unions on whatever terms it wished. Petitioners could not have "exerted countervailing economic pressure" against Newberg in that case. The fact that Newberg desired to please its customer and the fact that its customer was willing to pay an allegedly high price to avoid the costs associated with delay to its construction resulted in exactly what Petitioners now claim they seek—an outcome determined by "the respective economic strengths of union and employer."

The Complaint alleges no activity which violates any labor policies. Petitioners complain simply that during a labor dispute, the Unions successfully pressured those businesses which had a great amount to lose from work stoppages into agreeing to wage demands to which Petitioners would have chosen not to agree. But neither the Unions' vigorous pursuit of higher wages nor Edison's or Newberg's acquiescence violates labor policy. "The Union need not gear its wage demands to

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(Footnote continued from preceding page.)

markets. These restraints were held not exempt from antitrust attack. *Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F. 2d 1172 (5th Cir. 1976); *Carpenters District Council* v. *United Contractors Ass'n*, 484 F. 2d 119 (1973), *modified on other grounds*, 539 F. 2d 1092 (5th Cir. 1976); *International Ass'n of Heat & Frost Insulators* v. *United Contractors*, 483 F. 2d 384 (3rd Cir. 1973). *See also, Los Angeles Meat & Provision Drivers Union* v. *U. S.*, 371 U. S. 98 (1962); *Columbia River Packers Ass'n* v. *Hinton*, 315 U. S. 143 (1942). These cases are irrelevant to the instant case, in which Petitioners simply contend that any agreement not negotiated by the Associations is not a *"bona fide"* agreement. Similar claims have been rejected. *See, Amalgamated Meat Cutters* v. *Wetterau Foods*, 597 F. 2d 133 (8th Cir. 1979).

wages which the weakest unit in the industry can afford to pay." *United Mine Workers* v. *Pennington*, 381 U. S. at 657, n. 2. Moreover, a union has no duty to reach wage agreements with all units in an industry simultaneously, and an employer and its customer have no duty to suffer the ravages of economic warfare with a union until such time as all employers in the industry are able to enjoy industrial peace.

The direct restraint alleged does not involve a business or product market; the activities alleged do not contravene labor policy; and the effects of the Escrow Agreement of which Petitioners complain "follow naturally from the elimination of wage competition." *Connell*, 421 U. S. at 626. Accordingly, the nonstatutory exemption was correctly applied and no novel issue of national labor policy is presented by this case.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX OF RELEVANT STATUTORY AUTHORITY

Section 6 of the Clayton Act, 15 U.S.C. § 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52, provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to

abstain from working or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any persons engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . .
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value; . . . .

Section 5 of the Norris-LaGuardia Act, 29 U.S.C. § 105, provides:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides in relevant part:

> When used in this chapter, and for the purposes of this chapter:
>
> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and

one or more employers or associations of employers; or (3) between one or more employees of associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions or employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. . . .

Section 1 of the National Labor Relations Act, 29 U.S.C. § 151, provides:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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No. 82-69

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

RESPONSE OF GUST K. NEWBERG CONSTRUCTION CO. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF AUTHORITIES

	Page
Cases	
United Mine Workers v. Pennington, 381 US 657; L.Ed. 2d 626, 85 S.Ct. 1585	3,4,5, 6,7,8
Connell Co. v. Plumbers and Steamfitters Local 100, 421 US 616, 44 L.Ed. 2d 418, 95 S.Ct. 1830	3,4,10
Smitty Baker Coal Co. v. U.M.W., 620 F.2d 416 (Cert.Den. 449 US 870, 1980)	7
Statutes	
Sherman Act (15 USC 1, etc.)	2
Clayton Act (15 USC §§15 and 16)	2

SUMMARY OF ARGUMENT

It is clear from the facts alleged in the complaint that the agreement entered into between the respondents is exempt from the provisions of the Sherman Act (15 USC 1, etc.), and the Clayton Act (15 USC §§15 and 16) because the record amply reflects that the agreement entered into between the respondents was a collective bargaining agreement affecting wages to be paid to union members, and was not entered into with the purpose of destroying the business of any competitor of any respondent.

ARGUMENT

THE FACTS SET FORTH IN PLAINTIFFS' COMPLAINT DO NOT ALLEGE A VIOLATION OF THE ANTI-TRUST LAWS BY DEFENDANTS.

The complaint in the instant case and the characterization of its allegations in the Petition For Writ of Certiorari present an artful, but ineffective, attemp to plead a case falling within the

decisions of this Court in United Mine Workers v. Pennington, 381 US 657, and Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 US 616.

The objective facts alleged in plaintiffs' complaint are that there was a work stoppage in Will County, Illinois by the respondent Carpenters Union because of inability to agree on terms of a collective bargaining agreement. Plaintiff associations represented the majority of employers of carpenters in the County, but did not represent either respondent Newberg or Commonwealth Edison. Newberg, as general contractor, was constructing a nuclear energy generating plant for Edison. The carpenters struck Newberg, as well as other employers in the area. Newberg, with the approval of Commonwealth, entered into an Escrow Agreement with the Union by which Newberg agreed to pay, retro-

actively, the amount ultimately agreed upon in the collective bargaining agreement resulting from negotiations between plaintiffs and the Union and further agreed to place the sum of $2.25 per hour in escrow so that the funds to make whatever payment was ultimately agreed upon would be available.

It is difficult to think of a labor-employer relationship more in accord with ordinary business practices, or more clearly within the labor exemption to the Anti-Trust Law.

By several artfully chosen adjectives imputing all sorts of malicious motives to defendants, plaintiffs seek to bring themselves within United Mine Workers v. Pennington, 381 US 657; L.Ed. 2d 626, 85 S.Ct. 1585 and Connell Co. v. Plumbers and Steamfitters, 421 US 616, 44 L.Ed. 2d 418, 95 S.Ct. 1830.

Connell Co., supra, involved an agree-

ment totally outside the ordinary framework of collective bargaining in that the agreement made was between the Union and a general contractor who did not employ and did not plan to employ any members of the Union. Pursuant to the agreement the general contractor agreed not to subcontract work to subcontractors who did not employ union members. This Court found the agreement not to be exempt from inquiry because of the remoteness of the non-union party from the employer-employee relationship. In the instant case, Newberg is the employer and the union represents employees and the subject of the agreement is not a boycott but wages.

The major difference between the instant case and the factual context set forth in Pennington was that in the instant case the moving party in the negotiations between Newberg and the Union was the Union, with Newberg being "pressured"

to agree (Complaint 40A). In Pennington, the employer group was not pressured to act but was at least a co-leader in creating a framework under the guise of a labor agreement which would have the immediate, direct and intended purpose and result of eliminating competition for these employers:

> "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 US pp. 665-666)

Here, as indicated, Newberg does not compete with the other employers. Commonwealth not only does not compete with the other employers but, as a public utility, does not compete with anybody.

As the Court of Appeals noted, Appendix to Petition, p. 15a, several Courts of Appeal have considered the elements which

will support a cause of action for conspiracy in spite of the exemption given to labor unions and collective bargaining agreements under the statutes (i.e., the statutory exemption) and the decisions of this Court reconciling the public policy expressed in the Sherman and Clayton Acts against combinations in restraint of trade, and the public policy in favor of protection of the right of labor to organize and bargain collectively (the non-statutory exemption). All of these courts have determined that predatory intent is an essential element of a cause of action under Pennington.

In Smitty Baker Coal Co. v. U.M.W., 620 F.2d 416 (Cert. Den. 449 US 870, 1980), the Fourth Circuit stated the elements required to be clearly alleged:

"It is thus manifest from this review of the pertinent authorities apply-

> ing the Pennington doctrine, on which the plaintiff relies for an antitrust conspiracy, that such doctrine requires (a) an agreement between the Union and the employer-group consisting of a substantial number of the larger employers in an industry to establish a wage scale for the employees-of-the-group-members-of-the Union, (b) which wage scale the Union and the employer group knew that the marginal employers in the industry could not afford, and (c) which wage scale the Union undertook to impose on the marginal nonmember operators, (d) with the intent to drive these marginal operators out of busines and to remove them as competitors of the employer-group."

In the instant case, element (a) is lacking in that it is clear that there is no employer group involved, nor are there a substantial number of employers involved. Indeed, the employer group is the plaintiff. Elements (b) and (c) are arguably present at the pleading stage but, if the Complaint is examined in recognition of the distinction between Pennington and the instant case as respects element (a), it will be seen

that (b) and (c) are also lacking because there is no allegation of a division into wealthy and marginal contractors in the Will-Grundy County areas. Element (d) is not met because there is no allegation that it was the intent of Newberg or Commonwealth Edison to drive plaintiffs out of business. Indeed, since the plaintiffs' members hire the majority of members of the union in the affected area, such a purpose could not reasonably be ascribed even to the Union.

Plaintiffs seem to make a further argument that, even if there is a labor exemption and even if this exception would apply where the agreement attacked is a collective bargaining agreement covering only the classic bargaining point of such an agreement, wages, the exemption is removed where one who is neither employer nor employee becomes a party to the agreement. We submit that

such a contention is patently ridiculous where, as here, the third party, Commonwealth Edison, is the one who is paying the bill because it will bear the additional costs incurred by Newberg in paying the higher wage scale. Connell Co., supra, so heavily relied upon by plaintiffs to establish the point that lack of a direct employer-employee relationship between the parties to an agreement under attack nullifies the exemption, involved a non-labor party who was in no way involved with the union and who made the agreement in order to restrain competition among those who would properly negotiate collective bargaining agreements with the union, none of which were involved in the contract.

Here, since Commonwealth Edison was the party which ultimately would bear the increased labor cost, its acquiescence in the agreement by Newberg to make pay-

ment could hardly disqualify this agreement from the exemption otherwise so clearly applicable.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals for the Seventh Circuit is manifestly correct and issuance of the Writ of Certiorari should be denied.

Respectfully submitted

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IN THE

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MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

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WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CASES

PAGE

Austin v. *House of Vision, Inc.*, 385 F. 2d 171 (1967), *aff'd on later appeal*, 404 F. 2d 401 (7th Cir. 1968) 2

Brotherhood of R. Trainmen v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5th Cir.), *aff'd*, 385 U. S. 20 (1966) 3

California State Council of Carpenters v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527, (9th Cir. 1980), *cert. granted*, ____ U. S. ____, 102 S. Ct. 998 (1982) 5

Columbia River Packers Ass'n v. *Hinton*, 315 U. S. 143 (1942) 3

Conley v. *Gibson*, 355 U. S. 41 (1957) 2

Connell Construction Co. v. *Plumbers and Steamfitters Local 100*, 421 U. S. 616, *reh. denied*, 423 U. S. 884 (1975) 3, 4

Erie R. Co. v. *Local 1286, International Longshoremen's Ass'n, et al.*, 117 F. Supp. 157 (W. D. N. Y. 1957) 3

Poller v. *Columbia Broadcasting System*, 368 U. S. 464 (1962) 2

UMW v. *Pennington*, 581 U. S. 657 (1965) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MID-AMERICA REGIONAL BARGAINING ASSOCIATION, CONTRACTORS ASSOCIATION OF WILL AND GRUNDY COUNTIES, RESIDENTIAL CONSTRUCTION EMPLOYERS COUNCIL, JOLIET CONSTRUCTION CO. and U.S. HOME CORPORATION,

Petitioners,

vs.

WILL COUNTY CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO), COMMONWEALTH EDISON COMPANY and GUST K. NEWBERG CONSTRUCTION CO.,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY[1]

The Seventh Circuit's decision to affirm the dismissal of Petitioners' Complaint has denied Petitioners their right to prove the allegations of their Complaint where Petitioners

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[1] References made herein to the briefs filed by Respondents in opposition to Petitioners' petition for a writ of certiorari are as follows: Commonwealth Edison's Brief ("Commonwealth's Br. ____"); Will County Carpenters District Council's Brief ("District Council's Br. ____").

clearly have demonstrated that neither the statutory nor the non-statutory labor exemption applies to immunize Respondents' conspiracy from the antitrust laws. The Seventh Circuit's decision contravenes the liberal notice pleading requirements established in *Conley* v. *Gibson*, 355 U. S. 41 (1957), to test the sufficiency of a complaint and the strong judicial policy against granting of motions to dismiss in the antitrust area. *Austin* v. *House of Vision, Inc.*, 385 F. 2d 171 (1967), *aff'd on later appeal*, 404 F. 2d 401 (7th Cir. 1968).

The Seventh Circuit erroneously characterized the Complaint to allege nothing more than a conspiracy based upon the Escrow Agreement which, according to the Seventh Circuit, is immune from antitrust challenge because it is "similar to a traditional collective bargaining agreement" (App. A, p. 11a, n.14). Neither the Seventh Circuit nor any of the Respondents in their briefs to this Court are able to explain how the Escrow Agreement can be considered a collective bargaining agreement entitled to the protection of the labor exemption from the antitrust laws. Commonwealth, a non-labor, non-employer entity, instigated and negotiated the Escrow Agreement and employed it to circumvent and render meaningless the collective bargaining process in Will County. Petitioners allege in ample detail the facts constituting Respondents' conspiracy by pleading that Respondents acted in concert with the knowledge and intent that the effects of their unlawful arrangements would be to impose artificially high wages on all employers of Union carpenters in Will County, to damage the Associations and Contractors in their respective businesses and to unlawfully favor Newberg over other employers in Will County (App. C, p. 43a). This Court is free to examine Petitioners' Complaint and determine whether a conspiracy in violation of the antitrust laws has been properly pleaded. *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464 (1962).

This Court has recognized the obvious: that stable labor relations can be established and preserved only within the confines of a *bona fide* collective bargaining relationship between union and employer. Consequently, this Court has consistently refused to permit strangers who interfere in that relationship to claim the labor exemption from the antitrust laws. *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100*, 421 U. S. 616, *reh. denied*, 423 U. S. 884 (1975). Here, Commonwealth, a total stranger to the collective bargaining process, intervened in the collective bargaining negotiations between the Associations and the Union and, pursuant to its conspiracy with the other Respondents, used its prodigious economic resources to impose a wage agreement upon all employers of Union carpenters in Will County in order to buy labor peace and aid a favored contractor. The resulting emasculation of the collective bargaining process in Will County and the dire economic injury suffered by Newberg's competitors who were not beneficiaries of Commonwealth's subsidies illustrate the disastrous effects of Respondents' conspiracy. Without a credible threat of antitrust liability, any financially powerful entity will feel free to intervene in the collective bargaining process to advance interests which are unrelated to legitimate labor concerns[2] at the expense of the collective bargaining process and competitive conditions in the affected industry.

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[2] An entity like Commonwealth which merely has an economic interest in the resolution of a labor dispute rather than an interest in furthering legitimate labor objectives is not a "person participating or interested in a labor dispute" and cannot fall within the ambit of the Norris-LaGuardia or Clayton Acts. Commonwealth's interest "to avoid expensive work stoppages on its construction projects" (Commonwealth's Br., p. 7), is totally removed from the labor issues affecting the employment relationship between the Union and the employers of its members. *See, Columbia River Packers Ass'n* v. *Hinton*, 315 U. S. 143 (1942); *Erie R. Co.* v. *Local 1286, International Longshoremen's Ass'n, et al.*, 117 F. Supp. 157 (W. D. N. Y. 1957); *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5th Cir.), *aff'd*, 385 U. S. 20 (1966).

Respondents are simply unable to cite any credible authority to support their proposition that a stranger to the union-employer relationship has unlimited license to interfere in the collective bargaining process. As a consequence, Respondents characterize the Escrow Agreement in various manners. Commonwealth innocently asserts that it meekly "acquiesce[d]" to the Union's demands (Commonwealth's Br., p. 14), totally ignoring the plain allegations of Petitioners' Complaint, which must be taken as true for purposes of deciding a motion to dismiss, that Commonwealth was the instrumental party in instigating and negotiating the Escrow Agreement. The Union more candidly admits that "both Newberg and Edison were valuable pawns" (District Carpenters' Br., p. 11), with which it could conspire to circumvent the collective bargaining process and impose the terms of the Escrow Agreement upon all employers of Union carpenters in Will County and to destroy the ability of the Associations to engage in effective collective bargaining. *UMW* v. *Pennington*, 581 U. S. 657 (1965), and *Connell, supra,* read together clearly dictate that Respondents' conspiracy be found unlawful since it was reached outside of

the collective bargaining process with the intent and effect of imposing an artificially high wage scale on all employers of Union carpenters in Will County to the distinct and intended advantage of Newberg.[3]

[3] Respondent Commonwealth suggests that Petitioners' Complaint fails to state a cause of action because Newberg was "pressure[d]" to join Respondents' conspiracy (Commonwealth's Br., p. 11). The degree of enthusiasm with which each of the Respondents joined and participated in the conspiracy is irrelevant as a matter of law where all of the Respondents knew and intended that their conspiracy would drive certain of Newberg's competitors out of business by imposing artificially high wages on them and would destroy the ability of the Associations to engage in their business of representing employers in collective bargaining negotiations. In *California State Council of Carpenters* v. *Associated General Contractors of California, Inc.*, 648 F. 2d 527, 531 (9th Cir. 1980), *cert. granted* ____ U. S. ____, 102 S. Ct. 998 (1982), the court held that the labor exemption was forfeited where two unions charged, *inter alia*, that the individual members of an association of general contractors "coerced and aided each other" to pursue a course of conduct designed to injure the plaintiff unions in their business as unions. The court attached no significance to the fact that some of the conspirators had been coerced participants in the conspiracy. Further, the majority of the Ninth Circuit rejected the dissenter's argument—an argument much like that advanced by the Respondents and the courts below—that an insufficient effect on a business market had been charged, finding that the plaintiff unions had been injured in their business of organizing and representing employees and negotiating collective bargaining agreements. The Associations have been injured in a similar manner, while the competitive injury to the Contractors of having to compete against Newberg without the benefit of Commonwealth's subsidies is obvious.

CONCLUSION

The Seventh Circuit's decision is an open invitation to strangers to the union-employer relationship to interfere in that relationship and at the same time claim the protection of the labor exemption from the antitrust laws that the proper parties to collective bargaining enjoy. The Seventh Circuit's decision in effect encourages unions and employers to abandon good faith negotiations and seek, as in the instant case, non-labor, non-employer allies with which they can conspire to achieve their objectives outside of the collective bargaining process. It is not hyperbole to state that the very stability and integrity of the collective bargaining process is at stake in the outcome of this case. This Court should reverse the Seventh Circuit's decision and afford Petitioners the opportunity of proving that Respondents' conduct violated the antitrust laws.

For all of the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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